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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States
October Term, 1995

R. RAY SINGLETON,

Petitioner,

v.

CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

JEREMIAH OLSON,

Petitioner,

v.

LUTHER MEMORIAL CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Establishment Clause of the United States Constitution precludes judicial review by a state trial court of claims relating to the discharge of a pastor in an action for breach of contract.

2. Whether the Establishment Clause of the United States Constitution precludes judicial review by a state trial court of claims relating to the discharge of a pastor in actions for wrongful discharge, promissory estoppel, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, tortuous interference with contract, defamation, violation of the state "Whistleblower Statute," and negligent hiring and retention.

RULE 29.6 LIST

The parent of the St. Paul Area Synod of the Evangelical Lutheran Church in America is the Evangelical Lutheran Church in America.

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PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment, opinion, and orders of the Minnesota Court of Appeals which affirmed the summary judgments of the District Court for Ramsey County, Minnesota.

OPINIONS BELOW

In R. Ray Singleton v. Christ the Servant Evangelical Lutheran Church and St. Paul Area Synod of the Evangelical Lutheran Church in America (hereinafter referred to as Singleton), the District Court for Ramsey County, Minnesota granted Respondent's Motions for Summary Judgment in an opinion dated January 9, 1996, which is included in the Appendix as Exhibit A. The Minnesota Court of Appeals affirmed the District Court's Opinion and dismissed this action in an opinion filed January 9, 1996, which is included in the Appendix as Exhibit B. The Supreme Court of Minnesota denied Petitioner's Petition for Review in an Order dated March 19, 1996, which is included in the Appendix as Exhibit C.

In Jeremiah Olson v. Luther Memorial Church, a Minnesota Religious Corporation, and the St. Paul Area Synod of the Evangelical Lutheran Church in America, (hereinafter referred to as Olson), the District Court for Ramsey County, Minnesota granted Respondent's Motions for Summary Judgment in an opinion dated June 27, 1995, which is included in the Appendix as Exhibit D. The Minnesota Court of Appeals affirmed the District Court's Opinion and dismissed this action in an opinion filed March 19, 1996, which is included in the Appendix as Exhibit E. The Supreme Court of Minnesota denied Petitioner's Petition for Review in an Order dated March 19, 1996, which is included in the Appendix as Exhibit F.

STATEMENT OF JURISDICTION

The Minnesota Court of Appeals affirmed the District Court's decision in Singleton in an opinion filed January 9, 1996, which is included in the Appendix as Exhibit B. The Supreme Court of Minnesota denied Petitioner's Petition for Review in an Order filed on March 19, 1996, which is included in the Appendix as Exhibit C. This Petition for Certiorari is filed within ninety (90) days of that date. This court has jurisdiction to review the judgment of the Minnesota Court of Appeals by a writ of certiorari pursuant to 28 U.S.C. §1257.

The Minnesota Court of Appeals affirmed the District Court's decision in Olson in an opinion filed February 20, 1996, which is included in the Appendix as Exhibit E. The Supreme Court of Minnesota denied Petitioner's Petition for Review in an Order filed on March 19, 1996, which is included in the Appendix as Exhibit F. This Petition for Certiorari is filed within ninety (90) days of that date. This court has jurisdiction to review the judgment of the Minnesota Court of Appeals by a writ of certiorari pursuant to 28 U.S.C. §1257.

Pursuant to Rule 12(4) these two judgments sought to be reviewed on a writ of certiorari are directed to the same court and involve identical or closely related questions. Petitioners are represented by the same counsel, Respondent St. Paul Area Synod of the Evangelical Lutheran Church in America is represented by the same counsel. The decision in Olson by the Minnesota Court of Appeals was primarily based upon the Court's ruling in Singleton, and the State of Minnesota Supreme Court denied review of both cases on March 19, 1996.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides:

> No person shall...be deprived of life, liberty, or property, without due process of law....

The Fourteenth Amendment of the United States Constitution, in relevant part, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Singleton

In 1987, Respondent Christ the Servant Evangelical Lutheran Church voted to "call" Petitioner Singleton as their pastor. The employment relationship was confirmed by a "Letter of Call" of the same date. The Constitution of Christ the Servant Evangelical Lutheran Church in effect at the time of call in 1987 provided that the call constituted a "permanent relationship," and that if Christ the Servant Evangelical Lutheran Church desired to terminate that relationship, it could be terminated only for seven (7) stated causes, following a specific formal procedure.[1]

On December 21, 1993, the Church Council of Respondent Christ the Servant Evangelical Lutheran Church recommended a budget reducing Petitioner Singleton's compensation by $16,000.00 per year. On January 10, 1994, the Congregation President of Christ the Servant Evangelical Lutheran Church asked Petitioner Singleton to resign.[2]

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[1] The seven (7) stated causes for termination were:

1. Death of the pastor or the dissolution of the congregation;
2. Resignation of the pastor;
3. Attainment by the pastor of the age of seventy (70) years, after which time pastor service may be extended from year to year by a two-thirds (K) vote at a congregational meeting;
4. Disqualification of the pastor through discipline;
5. Physical or mental disability of the pastor;
6. Continued neglect of duty; or
7. Inability to conduct the pastoral office efficiently in this congregation in view of local conditions, without reflection on the moral and spiritual character of the pastor.

[2] Petitioner Singleton began hemorrhaging and experiencing elevated blood pressure and bleeding to such a degree that he was not able to respond to this request for his resignation. Petitioner Singleton

Later that month, Respondent Christ the Servant Evangelical Lutheran Church approved a budget that included a 1994 salary for Petitioner Singleton in the amount of $3,368.00.

Although Petitioner Singleton sought assistance from Respondent St. Paul Area Synod of the Evangelical Lutheran Church in America, pursuant to the Synod Constitution, the Synod did not assist Petitioner Singleton, but rather aided in his termination. Subsequently, in April 1994, Petitioner Singleton brought suit in Ramsey County District Court against both the Church and the Synod asserting a claim for breach of contract. As additional causes of action, Petitioner also asserted wrongful discharge, promissory estoppel, breach of implied covenants of good faith and fair dealing, intentional infliction of emotional distress, tortuous interference with contract, and defamation.

On April 28, 1995, the District Court granted summary judgment in favor of the Church and Synod on all counts. On January 9, 1996, this decision was affirmed by the Minnesota Court of Appeals and the State of Minnesota Supreme Court denied review in an Order filed on March 19, 1996.

Olson

Petitioner Olson began his employment as assistant pastor of Respondent Luther Memorial Church in August 1990 pursuant to a "Letter of Call" in a "mutual relationship and commitment without limitation." Difficulties arose between Petitioner Olson, the senior pastor of Respondent Luther Memorial Church, and the Respondent St. Paul Area Synod of the Evangelical Lutheran Church in America. There was discussion of termination of Petitioner Olson. The

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has been emotionally and physically unable to return to work since that date.

Constitution of Respondent Luther Memorial Church provided a formal procedure for this termination.[3]

Respondent St. Paul Area Synod was pledged to uphold that Constitution. At the Annual Meeting of the Church on October 18, 1992, a resolution to eliminate Petitioner Olson's position was presented. The vote to accept the resolution and terminate Petitioner's position was 114 yes to 102 no and Petitioner Olson was terminated. Contrary to the provisions of the Church Constitution, this did not constitute the two-thirds majority vote necessary for termination of Petitioner Olson.

Additional provisions of the Constitutional procedure for termination were not followed. In fact, none of the procedure as set forth below was followed. The Respondent St. Paul Area Synod of the Evangelical Lutheran Church in America had knowledge of and assisted in the termination, in violation

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[3] Subsection d(3) provides the procedure for termination of a pastor. It provides the matter shall first be discussed with the pastor and if this does not resolve the issue, the synod bishop shall be notified and a reasonable period of time shall be allowed for the pastor to be called elsewhere. If the pastor is not called elsewhere, the congregation may request the pastor's resignation. If the pastor refuses, the congregation shall have the right to terminate the service of the pastor, in which case the following procedure is observed:

1. reasons for demanding the pastor's resignation must be stated in writing and duplicate copies given to the Synod pastor and bishop at least two weeks before the meeting at which action is contemplated.
2. a meeting of the congregation shall be called by its chair, or if he/she refuses, it shall be publicly announced in due time; at the meeting fair consideration shall be given to all parties concerned and discussion shall be limited to the points previously stated in writing. The synod bishop presides.
3. the synod bishop shall then call for a vote by ballots to decide whether or not the pastor's services shall be terminated in the light of this discussion. If two-thirds (K) of the votes cast, favors such action, the services of the pastor in the congregation shall be concluded within ninety (90) days after this meeting.

of its own Constitution and the Constitution of Luther Memorial Church. After the Synod declined to correct the situation, Petitioner Olson brought suit in Ramsey County District Court against both the Church and Synod for breach of contract. He also asserted claims for wrongful discharge, promissory estoppel, tortuous interference with contract, breach of implied covenants of good faith and fair dealing, defamation, intentional infliction of emotional distress, violation of the State "Whistleblower Statute," and negligent hiring and retention.

On June 27, 1995, Ramsey County District Court granted summary judgment in favor of the Respondents on all counts. On February 20, 1996, this decision was affirmed by the Minnesota Court of Appeals and the State of Minnesota Supreme Court denied review in an Order filed on March 19, 1996.

REASONS FOR GRANTING THE WRIT

The question before the Court is whether the employment contracts of a church are enforceable. The corollary question is whether clergy have the same right of protection as employees of a secular entity when a religious corporation breaches the procedural requirements of its own constitution.

The Court of Appeals decided that a pastor may never bring a civil action for breach of contract to enforce the procedural obligations of a church contained in its own constitution. The Court of Appeals based its decisions in both cases on the Establishment Clause of the United States Constitution. Without the assistance of the Court, churches will be free to violate public policy and discharge their clergy without having to follow the procedures they themselves have established.

This result is contrary to the prior rulings of this Court. It is also contrary to the decisions of many other state courts of last resort.

The issue of the trial court's jurisdiction over matters involving clergy in the State of Minnesota is timely and pressing. This Court is now considering a Petition for Writ of Certiorari by the Plaintiffs in Basich v. Board of Pensions, Evangelical Lutheran Church in America, 540 N.W.2d 82 (Minn. App. 1985). Application of this Court's decision must be corrected in the State of Minnesota.

I. THE MINNESOTA STATE COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT.

A. THIS COURT HAS ESTABLISHED A "NEUTRAL PRINCIPLES" DOCTRINE

The Court of Appeals held that the Establishment Clause precludes judicial review of a pastor's breach of contract claim because review would cause excessive entanglement in the governance of the Church. B-7. The Court of Appeals reasoned that pursuant to Jones v. Wolf, 443 U.S. 595 (1979), the "neutral principles" approach is limited to church property and membership disputes. B-7. These holdings, and the reasoning upon which they are based, is incorrect.

The Establishment Clause of the First Amendment guards against "excessive entanglement" by the government with the free exercise of religion. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). However, the First Amendment prohibits entanglement in areas of religious doctrine, but not necessarily in the areas of tort or contract law. These two cases involve no matter of doctrine and are within the jurisdiction of the civil court.

The Court of Appeals held that the Establishment Clause mandates that questions concerning the employment of clergy never be reveiwed. This is not correct. The Establishment Clause prohibits inquiry only into certain areas: areas of religious doctrine, subjective interpretations, or examination of the individual's qualifications or abilities as a pastor. See, e.g., Lewis v. 7th Day Adventist Lake Region Conf., 978 F.2nd 940 (6th Cir. 1992), In Young v. N. Ill. Conf. of United Methodist Church, 21 F.3rd 184 (7th Cir. 1994), Natal v. Christian and Missionary Alliance, 878 F.2nd 1575 (1st Cir. 1989), Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983), Powell v. Stafford, 859 F.Supp. 1343 (D. Colo. 1994).

In Serbian Eastern Diocese v. Milivojevich, 426 U.S. 696 (1976), the Court held that matters of organization of government of a church and purely religious controversies are not the proper subject of court inquiry. Milivojevich, at 713. The Court stated:

> The First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchial polity, but must accept such decisions as binding on them in their application to the religious issues of doctrine or polity before them.

Milivojevich, at 709.

Milivojevich and its progeny do not prohibit review of all employment matters concerning a church's pastor. Two years after it decided the Milivojevich case, the Court held that Milivojevich is not a bar to purely secular disputes between third parties and a church in which fraud, breach of contract, or statutory violations are alleged. General Council on Fin, Etc. v. Superior Court, 439 U.S. 1355,1374 (1978).

In follow-up to Milivojevich, the "neutral principles" doctrine was set forth in Jones v. Wolf, 443 U.S. 595 (1979).

The Court in Jones emphasized that Milivojevich only requires that if interpretation of the religious institution's documents would require the Court to resolve a religious controversy, then the Court must defer to the "authoritative ecclesiastical body" of the Church. Jones at 605. However, so long as examination of documents such as the church constitution do not involve consideration of doctrinal matters (ritual, liturgy of worship, or tenants of faith), a State is constitutionally entitled to adopt "neutral principles of law as a means of adjudicating a church property dispute." Ibid.

The State of Minnesota adopted the "neutral principles" doctrine of Jones in Piletich v. Deretich, 328 N.W.2nd 696 (Minn. 1983). In the instant cases the Court of Appeals held that the "neutral principles" approach has been adopted by the Minnesota Supreme Court "only to resolve church property and membership disputes". B-10. Piletich does not so hold. Piletich involved a church property and membership dispute, and the Supreme Court held that the "neutral principles" approach could be applied to that dispute. Piletich, at 701. However, this is not the same as saying that the "neutral principles" approach can only be applied to such disputes.

A full reading of Piletich shows that its holding is not as limited as it is set forth by the Court of Appeals. After making its ruling, the Piletich Court stated, "A brief discussion of our prior decisions in this area illustrates their compatibility with the neutral principles of law approach outlined above." Id. The Court then went on to discuss prior case law which supported its ruling, including Blauert v. Schupmann, 63 N.W.2d 578 (Minn. 1954) (involving termination of a pastor and control of church property), which it cites to endorse the "willingness by the Court to enforce the contractual agreements of the parties". Piletich, at 702.

The Court of Appeals stated that Blauhert is of no precedential value because it was decided before Piletich and Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696

(1976). B-10. This conclusion is not correct. Piletich, decided after Milivojevich, incorporated Blauhert into its rationale. A full and complete reading makes it clear that Blauhert remains good law and that the interpretation by the Court of Appeals of Piletich is incorrect.

In Piletich, the Court found that the church was not hierarchial with respect to resolution of an intra-congregational dispute over local property or membership qualifications because the church constitutional documents put control of those issues into the hands of the local church and since the Court did not have a doctrinal matter before it, nor a matter committed to adjudication by the highest tribunal in a hierarchial church (as in Milivojevich), and the issue could be determined by the documents of the local church, the First Amendment did not bar resolution of the issue.

B. NEUTRAL PRINCIPLES DOCTRINE ALLOWS THE STATE OF MINNESOTA TO RECOGNIZE A BREACH OF CONTRACT CLAIM BY A PASTOR AGAINST A CHURCH

Other courts have expanded the "neutral principles" approach beyond property disputes, and the State of Minnesota has a valid basis for doing so also. In Minker v. Baltimore Annual Conf., 894 F.2nd 1354 (D.C. Cir. 1990), a pastor filed a complaint against his church for age discrimination and breach of contract. In compliance with Milivojevich, the Minker Court found that it could not resolve issues of religious doctrine or polity and therefore could not get into subjective issues such as age discrimination. Minker, at 1358. However, citing Jones v. Wolf, supra, the Minker Court held that it *could* interpret positions of religious documents involving property rights and other non-doctrinal matters as long as the analysis could be done in purely secular

terms. Ibid. Holding that a contract of a church is enforceable in a civil court, the Court held that it "may always resolve contracts governing the manner in which churches own property, hire employees, or purchase goods," Ibid, citing Watson v. Jones, 80 U.S. (13 Wall 679,714 1871). That is, the Minker Court held that while it could not look at the suitability of the Plaintiff for the pastorship, it could determine whether an alleged contract existed, and, as the suit sought money damages and not reinstatement of the pastor, review did not constitute excessive entanglement. Minker, at 1360-1361.

Although the Minnesota Court rejected the Pastor's breach of contract claim in Black v. Synder, 471 N.W.2nd 715 (Minn. App. 1991), it did so because the Plaintiff's Claim was "fundamentally connected to issues of church doctrine and governance." Black, at 720. In Black, the congregation followed correct church procedure for termination of the pastor's call and undertook the discipline process outlined in Chapter 20 of the ELCA constitution relating to the issue as to whether or not she was discharged for "inability to conduct her ministry effectively." Ibid.

The question of "inability to conduct ministry effectively" is just the type of subjective question involving inquiry into church doctrine and governance prohibited by Milivojevich. However, in the instant cases, no such subjective inquiry is required. Here, the claim are that the Church's Constitution and procedure were not followed. That is the essential issue at stake. In line with Piletich and its related cases, such an inquiry may be made.

The Black Court cited the Minker decision for the proposition that a pastor's breach of contract claim that does not necessarily entangle the court in matters of church doctrine would not be outside of the Court's jurisdiction. Black, at 720. The Court stated that Minnesota's decisional law relating to breach of contract and defamation are content

neutral and that the Free Exercise Clause does not prohibit their application to most employment relationships of religious organizations. Ibid, at 719. Therefore, there is sufficient Minnesota case law to support Plaintiff's claims.

C. NEUTRAL PRINCIPLES DOCTRINE ALLOWS THE STATE OF MINNESOTA TO RECOGNIZE TORT CLAIMS BY A PASTOR AGAINST A CHURCH

The Court of Appeals was also incorrect in rejecting Petitioners' tort claims. In Rayburn v. General Conf. of 7th Day Adventists, 772 F.2nd 1164 (4th Cir. 1985), the plaintiff, denied a pastoral position, brought an action against the church charging racial and sexual discrimination. The Court held that application of the Civil Rights Act of 1964 would cause excessive entanglement with church authority and restrict the church's free choice of its leaders, issues involving spirituality and guidance of the Holy Spirit. Rayburn, at 1170. However, the Rayburn Court went on to state that "churches are not above the law. They may be held liable for their torts and upon their contracts. Employment decisions that do not involve the church's spiritual functions may be reviewed." Rayburn, at 1171.

Also, in Drevlov v. Lutheran Church, Missouri Synod, 991 F.2nd 468 (8th Cir. 1993), a pastor filed a complaint against the Synod for libel, negligence, and intentional interference with his legitimate expectancy of employment. The Drevlov Court held that personnel decisions are protected from civil court interference where the court would be required to interpret and apply religious doctrine or ecclesiastical law. However, the First Amendment does not protect the employment decisions of religious organizations that do not involve religious beliefs or procedures or the individual's fitness as a pastor. Drevlov, at 471-472.

II. THE STATE OF MINNESOTA COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

Minnesota's restricted interpretation of the Jones v. Wolf "neutral principles" approach conflicts with the rulings of many other state courts. For example, in Feldbin v. Temple Beth-el of Manhatten, 620 N.Y.S.2nd 113 (A.D. 2 Dept. 1994), the plaintiff's contract as rabbi of the Defendant Temple was not renewed at a special meeting of members. The Court held that failure to renew the contract could be reviewed, and was to be judged in terms of whether the Defendant's Constitution and Bylaws were followed. Feldbin, at 114.

In Fellowship Tabernacle, Inc. v. Baker, 869 P.2nd 578 (Idaho App. 1994), when a dispute arose over a pastor's term of office, the church sought injunctive relief and the pastor claimed breach of contract. Holding that the jury was not asked to decide any ecclesiastical issues, but rather to examine the bylaws of a non-profit corporation governing its corporate affairs, the Court allowed review. The Court stated, "The issues before the District Court and jury involved an employment contract, its alleged breach, the various reasons asserted for the breach, and the damages related to the breach. Simply because a church is involved in litigation does not make it ecclesiastical." Fellowship Tabernacle, Inc., at 583.

In Bacher v. Metcalf, 611 SO.2nd 1030 (Ala. 1992), the church brought an injunctive action against its pastor and others from continuing as church officers. The Alabama Court reaffirmed that civil courts cannot adjudicate religious disputes concerning spiritual or ecclesiastical matters, but can resolve disputes concerning civil or property rights. Bacher, at 1031.

In Robinson v. Davis, 511 N.Y.S.2nd 311 (A.D. 2 Dept. 1987), a pastor sought to enjoin his congregation from holding

a meeting for the purpose of dismissing him from the church. The meeting was held and the vote to dismiss the pastor upheld, in that the Court found that the church had followed the proper procedure. Robinson, at 312.

There are additional cases holding that the Court will interfere to protect a pastor in his or her employment when the relationship with the church is such as to confer a property right, if the dispute involves purely secular issues and can be resolved by application of "neutral principles of law" without entanglement with matters of the church's faith, discipline, or doctrine. See, e.g. McElroy v. Guilfoyle, 589 A.2nd 1082, 1083-1084 (N.J. Super L. 1990), First Union Baptist Church of Alexandria v. Banks, 533 SO.2nd 1305, 1309-1310 (La. App. 3 Cir. 1988), Lily of the Valley Spiritual Church v. Sims, 523 N.E.2nd 999, 101 (Ill. App. 1 Dist. 1988), Reardon v. Lemoyne, 454 A.2nd 431-432 (N.H. 1982).

Therefore, consistent with the decisions of the United States Supreme Court, case law from other state courts of last resort makes clear that where the dispute involves non-hierarchial, non-doctrinal contract disputes, a civil court retains jurisdiction to hear the dispute. Tibbs v. Kendrick, 637 N.E.2nd 397, 402 (Ohio App. 8 Dist. 1994). Gilespie v. Elkins Southern Baptist Church, 350 S.E.2nd 715, 718 (W. Va. 1986); dispute between pastor and church over alleged wrongful discharge held to be subject to jurisdiction of civil court when church congregational in polity so that all power and authority was vested in the local congregation rather than in a hierarchial structure. The decisions by the Court of Appeals are contrary to the decisions of those other states. This Court needs to rule on this issue so that there can be uniform application throughout the United States.

III. THE COURT OF APPEALS' DECISION VIOLATES THE DUE PROCESS CLAUSE.

This Court has long recognized that the Due Process Clause protects an individual's right to have a claim heard by a court of law. See, e.g. Logan v. Zimmerman Brush Co., 445 U.S. 422, 429 (1982). When an individual's claim involves a fundamental right, an individual may be denied the right to have the claim heard only if there is "a countervailing state interest of overriding significance." Boddie v. Connecticut, 401 U.S. 371, 377 (1971); see also Ortwein v. Schwab, 410 U.S. 656, 662-63 (1973) (Douglas, J., dissenting).

The right to enforce another party's contractual obligations is a fundamental right protected by the Constitution. See, e.g. U.S. Const. Art. I, §10; cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432 (1968). Thus, a state can take away an individual's right to enforce the contractual obligations of another only if the state has a compelling interest in doing so. See e.g., Boddie, 401 U.S. at 377-78; Ortwein, 410 U.S. at 663 (Douglas, J., dissenting).

No compelling interest supports the Court of Appeal's denial of Petitioners' right of access to the courts.

IV. THE COURT OF APPEALS' DECISION VIOLATES THE EQUAL PROTECTION CLAUSE.

Although this Court has often dealt with the issue of access to the courts in terms of due process, it also has recognized that the right of access is protected by the Equal Protection Clause. See, e.g., Long v. District Court, 385 U.S. 192, 193-95 (1996); Boddie v. Connecticut, 401 U.S. 371, 385-86, 387-89 (1971) (Douglas, J., concurring in the result and Brennan, J., concurring in part); Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995), Petition for Cert. filed, 64 U.S.L.W 3642 (March 11, 1996) (No. 95-1469). The Equal

Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

In evaluating an equal protection claim, this Court has held that it must first determine the proper standard to use in reviewing the classification and it must then analyze the purpose of the classification to determine whether it satisfies that standard. See e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980). If a classification impinges upon a fundamental right, strict scrutiny is the proper level of review. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 16 (1973).

Here, the Minnesota Court of Appeal's interpretation of the Establishment Clause has the effect of creating two classes of employees: those who are employed by secular corporations and those employed by religious corporations. The former classification impinges upon a fundamental right--the right of Petitioners to have access to the courts to have disputes regarding their contractual rights heard. Thus, this classification can stand only if the purpose of the classification can withstand strict scrutiny. See, e.g., Murgia, 427 U.S. at 312; Rodriguez, 411 U.S. at 16. This classification cannot withstand strict scrutiny.

Under the Court of Appeal's decisions, a pastor may never bring an action to enforce the procedural obligations of a church contained in its own constitution. Without the assistance of this Court, churches will be free to violate public policy and discharge their clergy without having to follow the procedures they themselves have established. This result is a violation of the Establishment Clause and contrary to the prior rulings of this Court as well the rulings of numerous other state courts.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their Petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX AND ITS INDEX

A. Unpublished Order, Ramsey County District Court, April 28, 1995 ..... A-1

B. Singleton v. Christ the Servant Evangelical, 541 N.W.2d 606 (Minn. App. 1996) B-1

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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

R. Ray Singleton,

Plaintiff,

vs.

ORDER

File No. C6-94-5824

Christ the Servant Evangelical Lutheran Church, and the Saint Paul Area Synod of the Evangelical Lutheran Church in America,

Defendants.

The above-entitled matter came on before the Honorable Kathleen Gearin, Judge of District Court on the 28th day of February, 1995 for a motions for Summary Judgment by each defendant.

Scot W. Lofthus appeared for and on behalf of the plaintiff R. Ray Singleton. Kristen Peterson LeBre appeared for and on behalf of the defendant Christ the Servant Evangelical Lutheran Church. Carole Lofness Baab appeared for and on behalf of the defendant Saint Paul Area Synod of the Evangelical Lutheran Church.

Based upon the arguments of counsel, files, records and proceedings herein the Court makes the following

ORDER:

1. The defendant Saint Paul Area Synod of the Evangelical Lutheran Church in America's Motion for Summary Judgment is hereby granted.

2. The defendant Christ the Servant Evangelical Lutheran Church's Motion for Summary Judgment is hereby granted.

3. That the attached Memorandum is make a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 28, 1995

s/s
Kathleen Gearin
Judge of District Court

MEMORANDUM

The plaintiff was the pastor of Christ the Servant Evangelical Lutheran Church from 1987 to early 1994. This congregation is part of the St Paul Synod of the Evangelical Lutheran Church of America. He is suing the congregation and the synod. The defendants have challenged all of the legal claims on constitutional grounds. Alternatively, they assert that the material facts proffered by the plaintiff are not legally sufficient to support any of the separate causes of action filed against the defendants in the complaint.

The United States and Minnesota constitutions require that a court give careful scrutiny to any involving a religious entity. The reasons for this are clear. Freedom of religion is one of the basic tenets of our federal and state constitutions. Governments must not interfere with religious freedom. The judicial branch of government is prohibited from interfering with the internal affairs of religious institutions. Churches must be free to govern themselves without excessive governmental entanglement.

The hiring and firing of a pastor is one of the most important decisions that a congregation makes. In this case, the plaintiff alleges that the defendants did not follow the terms of the Synod constitution, the Church constitution, and the Letter of Call. He discusses various provisions of these document in his brief. These are religious documents governing Lutheran Church of America synods and congregations. If they are contracts, they are religious ones, not civil ones. The contract claims in this lawsuit require the courts to interpret the meaning of these documents. The Minnesota case of **Black v. Snyder, 471 N.W.2nd 723**, held that a similar breach of contract claim required court review of the church's reasons for the discharge which would involve the court in issues fundamentally connected to matters of church governance and doctrine.

The Black case also held that the-defamation claim must be dismissed because it "... would require a similar review of the church's reasons for discharging Black, an essentially ecclesiastical concern.".**(id. at 720)**. The defamation allegations in this complaint would require a similar analysis.

Even if the claims were not constitutionally barred and the plaintiff were an employee of a civil entity, most of the claims would be dismissed. The plaintiff has not given this court a legal reason why it should ignore the Minnesota Supreme Court cases which hold that Minnesota does not have a cause of action for breach of implied covenant of good faith and fair dealing. **Nordling v. Northern States Power, 478 N.W.2nd 498; Hunt v IBM Mid America Employees Fed. Credit Union, 384 N.W.2nd 853**.

The defamation claims involve statements made by members of the church, not employees of the church. This court does not believe that a church should be held liable for statements of non-employees. In light of this court's constitutional rulings, it has not allowed the claim against the synod for the "paranoid" statement of its employee.

The plaintiff has not presented particularly egregious behavior on the part of the church or the synod that would overcome the strict requirements for the tort of intentional infliction of emotional distress discussed in the **Hubbard v. United Press Int'l Inc., 330 N.w.2nd 428 (Minn Ct. 1983)**. He has not met the high standard of proof necessary in Minnesota in order for that claim to be presented to a jury.

The claim for negligent infliction of emotional distress is even weaker. That tort requires the plaintiff to be in a zone of danger of physical impact. **Stadler v. Cross, 295 N.W.2nd 552** and **Leaon V. Washington Cty., 397 N.W. 2nd 867**. Plaintiff argued only the claim for intentional infliction of emotional distress in its memorandum opposing summary judgment. (Pages 35, 36, and 37). The defamation exception to this requirement was not argued by the plaintiff. The court

can only assume that the plaintiff has chosen to proceed only on his intent theory.

All of the allegations in the complaint arose after a painful separation of a pastor from his congregation. Because this relationship is basically a religious one, this lawsuit has been dismissed.

K.G.

STATE OF MINNESOTA

IN COURT OF APPEALS

C9-95-1278

Ramsey County
District Court File No. C6945824

Willis, Judge

R. Ray Singleton,

Appellant,

Scott W. Lofthus
Sjostrom and Lofthus
807 Twelve Oaks Center
15500 Wayzata Boulevard
Wayzata, MN 55391

vs.

Christ the Servant
Evangelical Lutheran Church,

Respondent,

David P. Pearson
Kristin Peterson LeBre
Winthrop & Weinstine, P.A.
3200 MN World Trade Center
30 East Seventh Street
St. Paul, MN 55101

Saint Paul Area Synod of
the Evangelical Lutheran
Church in America,

Respondent.

Carole Lofness Baab
Teresa M. Croke
Johnson & Condon, P.A.
7235 Ohms Lane
Minneapolis, MN 55439

Filed January 9, 1996
Office of Appellate Courts

SYLLABUS

1. The First Amendment Establishment Clause precludes judicial review of claims relating to the discharge of a pastor where review would cause excessive entanglement in the governance of the church.

2. Allegedly defamatory statements relating to a pastor's duties and job performance made by church members at church meetings and by a bishop's assistant to a church official are conditionally privileged and summary judgment is appropriate in the absence of a showing of malice.

Affirmed.

Considered and decided by Schumacher, Presiding Judge, Davies, Judge, and Willis, Judge.

OPINION

WILLIS, Judge

Pastor R. Ray Singleton challenges summary judgment in favor of Church and Synod, arguing that the Establishment Clause of the United States Constitution does not bar his claims of breach of contract, promissory estoppel, wrongful discharge, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and tortious interference with contract. Singleton also argues that the district court erred in granting summary judgment on his claims of defamation. We affirm.

FACTS

Christ the Servant Evangelical Lutheran Church (Church) called Ray Singleton to be its pastor. The letter of call

described certain elements of the relationship between the Church and Singleton, including the terms of a compensation package, which was subject to annual review. Financial problems and conflicts between Church members and their previous pastor regarding theological and administrative matters existed at the Church before Singleton's arrival and continued throughout his tenure as pastor. Several families left the Church because of differences with Singleton.

Conflicts within the Church heightened in late 1993. In October 1993, the Church council asked Singleton to leave a council meeting and to respond to a list of concerns. The Church formed a task force to consider remedies for the Church's financial difficulties. At the task force meetings, Church members identified general and specific aspects of Singleton's job performance as reasons certain members had left the Church and others had quit contributing financially to the Church.

Singleton communicated to the St. Paul Area Synod of the Evangelical Lutheran Church (Synod) that he wanted to pursue another call and in late December 1993 he interviewed with five other synods. The Synod communicated frequently with Singleton and with Church members throughout this period regarding Singleton's employment and problems at the Church.

On December 21, 1993, the Church council recommended a budget for 1994 that reduced Singleton's annual salary by $16,000. The Church council president drafted a report that included a request for Singleton's resignation. Singleton claims that he was physically and emotionally unable to continue his duties as pastor after receiving the council president's report on January 10, 1994 and that he was unable emotionally to formulate a response to the demand for his resignation. Approximately two weeks later, the congregation adopted a budget for 1994 that reduced the amount available for pastoral services to $3,368.

Singleton sued the Church, asserting claims of breach of contract, wrongful discharge, promissory estoppel, breach of the implied covenant of good faith and fair dealing, defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. In addition, Singleton brought claims against the Synod for tortious interference with contract, breach of the implied covenant of good faith and fair dealing, and defamation. The district court entered summary judgment in favor of the Church and the Synod on all claims. Singleton appeals.[1]

ISSUES

1. Did the district court err in determining that the Establishment Clause warranted summary judgment on Singleton's claims of breach of contract, wrongful discharge, promissory estoppel, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract?

2. Did the district court err in granting summary judgment in favor of the Church and Synod on Singleton's defamation claims?

ANALYSIS

On appeal from summary judgment, this court asks whether any genuine issues of material fact exist and whether the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). A reviewing court is not bound by and need not give deference to a district court's decision on a purely legal issue. Frost-

[1] Singleton does not challenge the district court's grant of summary judgment on his negligent infliction of emotional distress claim against the Church.

Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

I.

The Church and the Synod allege that the First Amendment to the United States Constitution prevents civil courts from reviewing Singleton's claims. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion * * * ." U.S. Const. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903 (1940). Under the Establishment Clause, an exercise of governmental authority is valid if it (1) has a secular purpose, (2) neither inhibits nor advances religion as its primary effect, and (3) does not create excessive entanglement between church and state. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971).

Whether government action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions, and the resulting relationship between the religious authority and government. Lemon, 403 U.S. at 615, 91 S. Ct. at 2112; Black v. Snyder, 471 N.W.2d 715, 720 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991). If a claim involves core issues of ecclesiastical concern, the potential for excessive governmental entanglement precludes judicial review. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976) (holding that the First Amendment barred judicial consideration of bishop's wrongful discharge claim). If the court can resolve the dispute by looking only to neutral principles of law, however, judicial review is permissible. Jones v. Wolf, 443 U.S. 595, 602-05, 99 S. Ct. 3020, 3025-26

(1979) (applying neutral principles of law analysis to church property dispute); Piletich v. Deretich, 328 N.W.2d 696, 701 (Minn. 1982) (adopting neutral principles of law analysis for "resolution of church property and membership disputes").

A. Claims of Breach of Contract, Wrongful Discharge, and Promissory Estoppel Against the Church

Singleton claims that the Church breached its contract with him and wrongfully discharged him by violating provisions of the Church's constitution and the terms of his call. He asserts specifically that, by approving the 1994 budget with a large salary decrease, the Church breached its contract with him and constructively discharged him without following its own procedures. He argues that the Church did not properly terminate his call because it did not articulate any of the six reasons for termination described in the Church's constitution. He also claims that the Church breached its contract by removing him from the Church finance committee, by holding Church council and task force meetings when he was absent, by failing to publish the 1994 budget three weeks prior to the congregational vote, and by failing to notify him properly of task force meetings. Singleton asserts that the Church's constitution and his call letter were a promise of continuing employment that he reasonably relied on to his detriment, thus raising his claim for promissory estoppel.

Courts generally refrain from considering claims that require "a searching and therefore impermissible inquiry" into church governance. Milivojevich, 426 U.S. at 723-26, 96 S. Ct. at 2387-88. In Black, this court dismissed an associate pastor's claims of breach of contract, retaliation, and violation of the whistleblower statute, reasoning that the claims

> relate specifically to factors of [Black's] appointment as associate pastor and discharge. These claims are fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives for discharging Black.

471 N.W.2d at 720.

As in Black, Singleton's claims of breach of contract, wrongful discharge, and promissory estoppel relate to his appointment and discharge as a pastor and are fundamentally connected to issues of church governance. Adjudication of these claims also would necessitate inquiry into the Church's motives for proposing to decrease Singleton's salary and for taking the other actions asserted by Singleton as breaches of contract. These claims, therefore, involve strictly ecclesiastical concerns.

Singleton argues that his claims could be decided by applying neutral principles of law. The Minnesota Supreme Court has adopted the neutral principles doctrine, however, only to resolve "church property and membership disputes." Piletich, 328 N.W.2d at 701. In doing so, the court relied primarily on Jones v. Wolf, in which the Supreme Court held that a "State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." 443 U.S. at 604, 99 S. Ct. at 3026. The present case does not involve a property dispute or a membership dispute. As a result, neutral principles of law analysis is inappropriate.

Even if Minnesota law permitted a neutral principles of law analysis of a pastor's employment-related claims, scriptural and other religious references in the Church's constitution and the call letter complicate secular analysis of the procedures described in those documents. Chapter 15 of the constitution,

for example, addresses discipline of Church members and mandates that "prior to disciplinary action, reconciliation will be attempted following Matthew 18:15-17 * * *." The Church constitution also states that the Church-pastor relationship can be terminated if the pastor is disqualified on "grounds of doctrine, morality, or continued neglect of duty." Singleton's call letter discusses his spiritual obligations to the Church, including to "preach and teach the Word of God; to conduct public worship; to administer the sacraments; to provide pastoral care and leadership * * * ." Judicial review of Singleton's claims, thus, would require an evaluation of scripture, doctrine, and moral principles. This is precisely the type of searching inquiry that intrudes into church doctrine and church administrative matters and engenders a prohibited relationship between the Church and the judiciary. See Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112; Black, 471 N.W.2d at 720.

Singleton cites Minker v. Baltimore Annual Conf., 894 F.2d 1354, 1359-61 (D.C. Cir. 1990), as the legal basis for applying neutral principles of law to his breach of contract claim. In that case, the court reversed the district court's dismissal of a pastor's oral contract claim, holding that

> [a]ppellant is entitled to prove up his claim of breach of oral contract to the extent that he can divine a course clear of the Church's ecclesiastical domain.

Minker, 894 F.2d at 1361.

Singleton's reliance on Minker is misplaced. The procedural posture of Minker and the present case differ. Minker involved a motion to dismiss rather than a summary judgment motion. See id. at 1356. The court in Minker recognized that a plaintiff, despite successfully opposing a

motion to dismiss, might find it difficult to avoid summary judgment:

> It could turn out that in attempting to prove his case, appellant will be forced to inquire into matters of ecclesiastical policy even as to his contract claim. Of course, in that situation, a court may grant summary judgment on the ground that appellant has not proved his case and pursuing the matter further would create an excessive entanglement with religion.

Id. at 1360. The Minker court's speculation regarding the plaintiff's ability to prove his case using neutral principles of law applies here. Singleton cannot prove his claims without asking the court to inquire into matters of ecclesiastical policy in the Church's constitution and in his letter of call.

Additionally, other federal appellate courts have reached a contrary conclusion when faced with facts similar to those in Minker. In Lewis v. Seventh Day Adventists Lake Region Conf., 978 F.2d 940 (6th Cir. 1992), the court of appeals affirmed dismissal of a minister's breach of contract, promissory estoppel, and related claims on Establishment Clause grounds. The court held that, even when the claims are based on misapplication of church procedures and laws, "civil courts may not intervene." Id. at 942-43. Similarly, the First Circuit affirmed dismissal of a wrongful discharge claim, concluding that

> [b]y its very nature, the inquiry * * * into the circumstances of [appellant's] discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance.

Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989). Finally, the Sixth Circuit concluded that the neutral principles doctrine

> has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be. The claim here relates to appellant's status and employment as a minister of the church. It therefore concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.

Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir.) (citing Kaufman v. Sheehan, 707 F.2d 355, 358 (8th Cir. 1983)), cert. denied, 479 U.S. 885, 107 S. Ct. 277 (1986).

At oral argument, Singleton asserted that Blauert v. Schupmann, 241 Minn. 428, 63 N.W.2d 578 (1954), permits this court to apply a neutral principles of law analysis. While the court in Blauert addressed the district court's determination that the congregation had legally discharged its pastor, the case dealt primarily with church property and membership disputes. 241 Minn. at 434-38, 63 N.W.2d at 583-85. Blauert also preceded the Supreme Court's decision in Milivojevich, which held that the First Amendment barred a bishop's wrongful discharge claim. 426 U.S. at 721-23, 96 S. Ct. at 2386-87. Further, Blauert preceded Piletich, in which the Minnesota Supreme Court limited its acceptance of the neutral principles of law doctrine to cases involving church property or membership disputes. Piletich, 328 N.W.2d at 701. We do not believe Blauert allows us to review Singleton's claims.

The district court properly granted summary judgment in favor of the Church on Singleton's claims of breach of contract, wrongful discharge, and promissory estoppel.

B. Claims of Breach of Implied Covenant of Good Faith and Fair Dealing Against the Church and the Synod

Singleton claims that the Church and the Synod breached the covenant of good faith and fair dealing established by his employment relationship with the Church. Minnesota law, however, does not recognize implied covenants of good faith and fair dealing in employment contracts. Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 858 (Minn. 1986); Spanier v. TCF Bank Sav., 495 N.W.2d 18, 21 (Minn. App. 1993), review denied (Minn. Mar. 22, 1993). In the absence of a contract regarding grounds for discharge, employees serve at the will of their employers. Spanier, 495 N.W.2d at 21.

In refusing to acknowledge the existence of implied covenants of good faith and fair dealing in Minnesota employment law, the supreme court recognized the difficulties of an inquiry into the reasons for terminating an employee:

> [T]o imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts.

Hunt, 384 N.W.2d at 858 (quoting Parnar v. Americana Hotels, 652 P.2d 625, 629 (Haw. 1982)). Because an action

for breach of the implied covenant of good faith and fair dealing has been found so invasive as to preclude judicial review of a secular employer's actions, we conclude that judicial inquiry into Singleton's implied covenant claims would excessively entangle the court in the internal affairs of the Church and the Synod.

As a matter of law, the district court properly rejected Singleton's claims of breach of the implied covenant of good faith and fair dealing against the Church and the Synod.

C. Claim of Intentional Infliction of Emotional Distress Against the Church

Singleton claims that the Church's conduct and statements by Church members caused him severe emotional distress. Specifically, Singleton points to several statements regarding an intention to remove him from his position as pastor, several statements about his job performance, his removal from several Church committees, submission of written "concerns" about his job performance, and the holding of Church meetings without informing him or members of his family.

In a claim for intentional infliction of emotional distress, a plaintiff must establish that (1) the conduct was extreme and outrageous, (2) the conduct was intentional or reckless, (3) it caused emotional distress, and (4) the distress was severe. Hubbard v. United Press Int'l, 330 N.W.2d 428, 438-39 (Minn. 1983). To satisfy the second prong of the test, the actor must intend to cause severe emotional distress or know that it is at least highly probable that emotional distress will result. Dornfeld v. Oberg, 503 N.W.2d 115, 119 (Minn. 1993). To determine whether the Church intended to cause Singleton emotional distress, a court would need to review the motivations for the Church's actions. The First Amendment prohibits judicial inquiry into motivations for a Church's pastoral employment decisions. See Black, 471 N.W.2d at

720 (dismissing a claim that was "fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives for discharging ([pastor]").

Singleton's claim for intentional infliction of emotional distress also fails because the Church's actions were not extreme and outrageous. Conduct is extreme and outrageous if it is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." Hubbard, 330 N.W.2d at 439 (citations omitted). Intentional infliction of emotional distress claims are "sharply limited to cases involving particularly egregious facts." Id. None of the Church's actions "passes the boundaries of decency" or is "utterly intolerable to the civilized community." We agree with the district court's conclusion that Singleton "has not met the high standard of proof necessary in Minnesota" to present to the jury his intentional infliction of emotional distress claim.

The district court correctly applied the law in granting summary judgment in favor of the Church on Singleton's claim of intentional infliction of emotional distress.

D. Claim of Tortious Interference with Contract Against the Synod

Singleton claims that the Synod tortiously interfered with his contract with the Church by communicating certain information to members of the Church council and by failing to discipline the Church for violation of the Synod's constitution. An interference with contract claim requires (1) a contract, (2) knowledge of the contract by the alleged wrongdoer, (3) intentional procurement of a breach of the contract, (4) no justification for the interference, and (5) damages. Kjesbo v. Ricks, 517 N.W.2d 585, 588 (Minn. 1994). Interference with a contract is justified if the conduct is reasonable in light of all the circumstances of the case. Id.;

Potthoff v. Jefferson Lines, 363 N.W.2d 771, 776 (Minn. App. 1985).

To analyze the justification element of this claim, the court would have to consider whether the bishop and his assistants acted reasonably. This analysis would require a review of the duties of the bishop and his assistants, matters of church governance within the Synod, the relationship between the Church and the Synod, the Synod's obligation to provide pastoral care, the Synod's obligation to discipline its member churches for violations of the Synod's constitution, and the bishop's authority to settle disputes within the Synod's member churches. These matters are ecclesiastical concerns not reviewable under the First Amendment. See Milivojevich, 426 U.S. at 721-23, 96 S. Ct. at 2386-87 (dismissing a bishop's wrongful discharge claim because it involved ecclesiastical issues that were barred from review by the First Amendment); Black, 471 N.W.2d at 720 (dismissing a discharge-related claim due to the "prohibition against litigating matters at the core of a church's religious practice * * *"). We conclude, therefore, that the district court properly granted the Synod's summary judgment motion on Singleton's claim of tortious interference with contract.

II.

A. Claim of Defamation Against the Church

The district court granted summary judgment to the Church on Singleton's claim of defamation, holding that the constitutional prohibition against excessive entanglement precluded review. The court also stated that the Church could not be held liable because the allegedly defamatory statements were made by members, rather than employees, of the Church. Because we hold that the statements were conditionally privileged and that Singleton failed to show malice, we do not

reach the constitutional or agency issues on which the trial court based its decision.

Singleton alleges that members of the Church defamed him by making statements that harmed his reputation and his *ability to obtain another call.* Singleton identifies 10 statements that he claims were defamatory:

> (1) An unidentified person at a task force meeting stated that Singleton did not attend a wedding rehearsal;
>
> (2) an unidentified person at a task force meeting stated that Singleton made a false statement regarding a Church member's attendance of a retirement party;
>
> (3) an unidentified person at a task force meeting stated that Singleton insisted that his salary should be paid before the Church's mortgage;
>
> (4) a Church member stated at a task force meeting that Singleton failed to visit in the hospital a woman with cancer;
>
> (5) a Church council member stated at a task force meeting that Singleton did not respond to her telephone call regarding an infant's death;
>
> (6) a Church member stated at a task force meeting that Singleton breached his duty of confidentiality by telling others of the member's abusive father and by stating that the member had a problem with authority;

(7) an unidentified person stated at the task force meeting that Singleton charged $500 for conducting a wedding;

(8) a Church member stated at a task force meeting that Singleton received eleven weeks of vacation;

(9) a Church youth committee member stated at a Church council meeting that Singleton had jeopardized the Church's insurance policy by taking the Church bus to camp; and

(10) a Church youth committee member stated at a Church council meeting that when Singleton was out of town he returned for funerals only of friends.

A statement is defamatory if (1) it is communicated to someone other than the plaintiff, (2) it is false, and (3) it tends to harm the plaintiff's reputation and tends to lower the plaintiff in the estimation of the community. Stuempges v. Park, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980) (citing Restatement (Second) of Torts §§ 558-559 (1977); W. Prosser, Handbook of the Law of Torts § 111 at 739 (4th ed. 1971)). A communication is conditionally privileged, however, if it is "made upon a proper occasion, from a proper motive, and * * * based upon reasonable or probable cause." Id. at 256-57 (quoting Hebner v. Great N. Ry., 78 Minn. 289, 292, 80 N.W.2d 1128, 1129 (1899)). The supreme court explained:

> The doctrine of privileged communication rests upon public policy considerations. * * * [T]he existence of a privilege results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory.

Lewis v. Equitable Life Assur. Soc., 389 N.W.2d 876, 889 (Minn. 1986).

Whether a particular communication is conditionally privileged presents a question of law. Id. If a defendant establishes that a conditional privilege exists, the burden shifts to the plaintiff to show that the defendant abused the privilege. Stuempges, 297 N.W.2d at 257. The plaintiff meets this burden by proving malice, which requires a showing that the defendant "made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." Id. (quoting McKenzie v. William J. Burns Int'l Detective Agency, 149 Minn. 311, 312, 183 N.W. 516, 517 (1921)). Although the jury normally determines whether a defendant abused its privilege, summary judgment is appropriate when "[t]he trial court record shows no facts which would lead to the conclusion that [the defendant] acted against [the plaintiff] out of malice or ill will." Harvet v. Unity Medical Ctr., 428 N.W.2d 574, 579 (Minn. App. 1988).

The supreme court has held that statements made by an employer when investigating employee misconduct are conditionally privileged. McBride v. Sears, Roebuck & Co., 306 Minn. 93, 97, 235 N.W.2d 371, 374 (1975). The court explained that "the employer has an important interest in protecting itself and the public against dishonest or otherwise harmful employees." Id. Further, in Gunufson v. Onan Corp., this court affirmed summary judgment in favor of a

corporation where employees made allegedly defamatory statements at a management meeting regarding the reason for plaintiff's dismissal. 450 N.W.2d 179, 183 (Minn. App. 1990). The court found that the communications were within the conditional privilege and were not actionable without proof of malice. Id.

The allegedly defamatory statements in this case, all of which the record reflects were communicated at task force meetings or Church council meetings and dealt with Singleton's actions as a pastor, fall within the Church's conditional privilege. The record reveals no facts that would lead to the conclusion that Church members acted against Singleton out of the kind of malice or ill will that defeats the privilege. As a result, there is no question of material fact concerning the existence of malice. We conclude, therefore, that the district court correctly granted summary judgment in favor of the Church on Singleton's defamation claim.

B. Claim of Defamation Against the Synod

The district court granted summary judgment to the Synod on Singleton's defamation claim, citing the constitutional prohibition against excessive entanglement. Because we find that the allegedly defamatory statement was conditionally privileged and that Singleton did not show malice, we do not address the constitutional issue.

Singleton asserts that he was defamed when a bishop's assistant told a Church official that Singleton was "paranoid." The record shows that the statement was made during a phone conversation in which the Church official and the bishop's assistant discussed conflicts in the Church, Singleton's position at the Church, and Singleton's compensation. Under these circumstances, we conclude that the bishop's assistant's statement falls within the conditional privilege. The record reveals no facts that would lead to the conclusion that the

bishop's assistant made the statement out of malice or ill will. There is no question, therefore, of material fact concerning the existence of malice and summary judgment in favor of the Synod was appropriate on Singleton's claim of defamation.

DECISION

The constitutional prohibition against excessive governmental entanglement with internal church affairs precludes judicial review of Singleton's claims of breach of contract, wrongful discharge, promissory estoppel, breach of implied covenant of good faith and fair dealing, tortious interference with contract, and intentional infliction of emotional distress. Additionally, the statements Singleton alleges to be defamatory were conditionally privileged, and the record does not reveal any facts indicating that the statements were made out of malice or ill will that would defeat the privilege. The district court, therefore, did not err by granting summary judgment to the Church and the Synod on all claims.

Affirmed.

Dated: January 2, 1996

s/s
Judge Bruce D. Willis

STATE OF MINNESOTA

IN SUPREME COURT

C9-95-1278

R. Ray Singleton,

Appellant,

vs.

Christ the Servant Evangelical Lutheran Church,

Respondent,

St. Paul Area Synod of the Evangelical Lutheran Church in America,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of R. Ray Singleton for further review be, and the same is, denied.

Dated: March 19, 1996

BY THE COURT:

s/ AM Keith

Chief Justice

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Jeremiah Olson, File No. C6-94-8853

Plaintiff,

vs. **ORDER**

Luther Memorial Church and Saint Paul Area Synod of the Evangelical Lutheran Church in America;,

Defendants.

The above-entitled matter came on for hearing before the Hon. Allan R. Markert, Judge of the District Court, on the 16th day of May, 1995, on a motion for summary judgment by defendants Saint Paul Area Synod of the Evangelical Lutheran Church in America and Luther Memorial Church. Appearances were:

Scott W. Loftus, for and on behalf of plaintiff Jeremiah Olson;

Carole Lofness Baab, for and on behalf of defendant Saint Paul Area Synod of the Evangelical Lutheran Church; and

Thomas M. Countryman, for and on behalf of defendant Luther Memorial Church.

Based upon the arguments of counsel, files, records and proceedings herein, the Court makes the following Order:

IT IS HEREBY ORDERED:

1. That the defendant, Saint Paul Area Synod of the Evangelical Lutheran Church in America's motion for summary judgment is hereby granted.

2. That the defendant, Luther Memorial Church's motion for summary judgment is hereby granted.

3. That the attached Findings of Fact and Memorandum are made a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/s
Alan R. Markert
Judge of the District Court

Dated this 27th day of
June, 1995.

CLB-61301.1

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Jeremiah Olson, File No. C6-94-8853

Plaintiff,

vs. **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM**

Luther Memorial Church and Saint Paul Area Synod of the Evangelical Lutheran Church in America;,

Defendants.

FINDINGS OF FACT AND MEMORANDUM

Plaintiff Pastor Jeremiah Olson was the assistant pastor at Luther Memorial Church from August 1990 until the congregation voted to eliminate the assistant pastor position in October 1992 due to financial shortages. Luther Memorial Church is a member of the Saint Paul Area Synod of the Evangelical Lutheran Church in America. Pastor Olson is suing the congregation and the Synod in relation to the elimination of his position at Luther Memorial. Both Luther Memorial and the Saint Paul Area Synod have challenged all of plaintiff's legal claims on constitutional grounds. Alternatively, defendants assert that the material facts asserted by plaintiff are not legally sufficient to support any of the separate causes of the action filed against the defendants.

Both the United States Constitution and the Minnesota Constitution guarantee that the government may not become excessively entangled with the free exercise of religion. In order to avoid states from becoming entangled in religious controversies, the First Amendment of the United States Constitution severely limits the role civil courts play in resolving religious disputes.

Courts strictly construe the First Amendment when determining whether a court may interfere with issues relating to a church's relationship with its pastor. Upholding the church's right to hire a pastor or fire a pastor without government interference is fundamental to the running of a church. Plaintiff alleges the defendants did not follow the Saint Paul Area Synod Constitution, the Luther Memorial Constitution or the Luther Memorial letter of call to Jeremiah Olson. All these are religious policies and documents which govern the synods and congregations of the Lutheran Church of America.

The Minnesota Court of Appeals case, Black v. Snyder, 471 N.W.2d 715, 723 (Minn. Ct. App. 1991) found a breach of contract claim against a congregation required judicial review of the church's reasoning for the discharge which would excessively entangle the court in issues fundamentally connected to matters of church goverance and doctrine. The Black decision also found that a defamation claim must be dismissed because it required a similar review of the church's reasonings for discharging the pastor which was "essentially an ecclesiastical concern." Id. at 720. For these reasons, plaintiff's claims are barred from further review by this court.

In addition to the constitutional grounds, there are also not sufficient material facts to support the separate causes of action. Minnesota has no cause of action for breach of implied covenant of good faith and fair dealings. Nordling v. Northern States Power Co., 478 N.W.2d 498; Hunt v. IBM Mid-America Employees' Fed. Credit Union, 385 N.W.2d 853.

Plaintiff has not presented evidence or facts of egregious behavior on the part of the Saint Paul Area Synod or Luther Memorial congregation that would overcome the strict requirements for an intentional infliction of emotional distress claim. Hubbard v. United Press International, Inc., 330 N.W.2d 428 (Minn. Ct. 1983).

Plaintiff was not within his zone of danger of physical impact necessary to assert a claim for negligent infliction of emotional distress. Stadler v. Cross, 295 N.W.2d 552.

On the basis of the constitutional arguments, that the employment decisions were religious in nature and the court is prohibited from interfering, in addition to plaintiff's failure to assert sufficient evidence of the individual claims, the court grants defendants Saint Paul Area Synod and Luther Memorial Church's motions for summary judgment in their entirety and dismisses plaintiff's claims.

BY THE COURT:

Dated: 6/27/95.

s/s
Judge Allen R. Markert
Second Judicial District

CLB-61310.1

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1994).

STATE OF MINNESOTA

IN COURT OF APPEALS

C0-95-1623

Ramsey County
District Court File No. C6-94-8853

Amundson, Judge

Jeremiah Olson, Appellant,	Scott W. Lofthus Sjostrom and Lofthus 807 Twelve Oaks Center 15500 Wayzata Boulevard Wayzata, MN 55391
vs.	
Luther Memorial Church, Respondent.	Thomas M. Countryman James J. Galman Margaret C. Galvin Jardine, Logan & O'Brien, P.L.L.P. 2100 Piper Jaffray Plaza 444 Cedar Street St. Paul, MN 55101
and	
Saint Paul Area Synod of the Evangelical Lutheran Church in America,	Carole Lofness Baab Teresa M. Croke Johnson & Condon, P.A.

Respondent.

7235 Ohms Lane
Minneapolis, MN 55439

Filed: February 20, 1996
Office of Appellate Courts

Considered and decided by Amundson, Presiding Judge, Klaphake, Judge, and Harten, Judge.

UNPUBLISHED OPINION

AMUNDSON, Judge

Appellant Jeremiah Olson challenges the district court's grant of summary judgment in favor of the church and synod. Olson argues that the district court erred in determining that the First Amendment precluded it from reviewing this case because it would involve excessive entanglement in matters of church governance. Olson also argues that the district court erred in determining that there are no genuine issues of material fact regarding his claims. We affirm.

FACTS

Appellant Jeremiah Olson began as an assistant pastor at Luther Memorial Church on August 1, 1990. On October 18, 1992, the congregation voted to eliminate the position of assistant pastor. The church claims the position was eliminated for financial reasons. Olson's last Sunday was October 25, 1992.

Olson initiated this action against the church and synod, claiming that he was terminated in retaliation for reporting certain information about the church's senior pastor. Olson brought the following claims: (1) tortious interference with contract, (2) wrongful discharge, (3) promissory estoppel, (4)

implied covenant of good faith and fair dealing, (5) defamation, (6) intentional infliction of emotion distress, (7) violation of the "Whistleblower Statute," and (8) negligent hiring and retention. Olson's contract claims are based on his July 1, 1990, Letter of Call[1] and provisions of the church constitution regarding termination procedures.

The district court granted respondents' motion for summary judgment, concluding that Olson's claims are barred by the First Amendment. In addition, the court concluded that there were not sufficient material facts to support the separate causes of action because: (1) Minnesota has no cause of action for the covenant of good faith and fair dealing, (2) Olson presented no evidence of egregious behavior on the part of the synod or Luther Memorial congregation that would support an intentional infliction of emotional distress claim, and (3) Olson was not within the zone of danger of physical impact and so could not assert a negligent infliction of emotional distress claim. This appeal followed.

DECISION

The First Amendment precludes civil courts from resolving disputes involving churches if "resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity * * *." Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709, 96 S.

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[1] According to respondent Luther Memorial Church, a letter of call is:

> An ecclesiastical offer of employment from a congregation to the pastor. * * * In the letter of call, the congregation sets forth the duties and responsibilities it expects of the Pastor * * * as well as a statement of the congregation's financial and other commitments to the Pastor. The Pastor may freely accept or reject a letter of call.

Ct. 2372, 2380 (1976). However, a "State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." Jones v. Wolf, 443 U.S. 595, 604, 99 S. Ct. 3020, 3026 (1979). Olson asserts that Jones and other property dispute cases should be applied to breach of contract claims brought by discharged clergy. Neutral principles of law analysis is inappropriate in this case because it does not involve a church property dispute. See Singleton v. Christ the Servant Evangelical Lutheran Church, __ N.W.2d __ (Minn. App. Jan. 9, 1996).

Olson contends that in Black v. Snyder, 471 N.W.2d 715 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991), this court approved a breach of contract claim that did not require inquiry into doctrinal matters. In Black, however, this court determined that the former associate pastor's breach of contract claims were "fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives for discharging" the associate pastor. Id. at 720. Thus, the claims had to be dismissed under Milivojevich. Id.

Relying on Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990), Olson argues that a pastor's breach of contract claim that does not necessarily entangle the court in matters of church doctrine would not be outside the court's jurisdiction. As this court noted in Singleton, Minker involved a motion to dismiss rather than a summary judgment motion, and the court in Minker noted that even though the plaintiff successfully opposed the motion to dismiss, it might be difficult for the plaintiff to avoid summary judgment. Singleton, __ N.W.2d at __. In addition, the exception created in Minker was for an oral contract claim. 894 F.2d at 1361. Olson makes no oral contract claims and thus, even if this court adopted the Minker analysis, his claim would fail.

Implied Covenant of Good Faith and Fair Dealing

Minnesota does not recognize this cause of action in employment disputes. See Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853, 858 (Minn. 1986).

Contract Claims

Olson's breach of contract, wrongful discharge, and promissory estoppel claims are based on the Letter of Call and the church constitution. Resolution of these issues would require this court to interpret ecclesiastical documents regarding discipline, discharge, and proper expenditure of church funds and thus would be improper under the First Amendment. See Singleton, __ N.W.2d at __.

Defamation

In his complaint, Olson alleged that Bishop Erdahl of the synod made the following "false statements": that Olson was "on leave without call"; that Olson had "physically threatened" him; that Olson was a "troublemaker"; and that Olson and his wife are "pathological" and "obsessive-compulsive." In his brief, Olson indicates that Erdahl stated that Olson would not get another call unless he underwent counseling and that he called two pastors at Salem Lutheran Church and told them not to believe anything Olson said. Because these alleged defamatory statements relate to respondents' reasons and motives for making their employment decisions, such an inquiry is barred by the First Amendment.[2]

---

[2] See Black, 471 N.W.2d at 720 (defamation claim based on church's stated reasons for discharge as "inability to conduct her ministry efficiently" would require review of church's reasons for discharging her, and thus was barred); Schoenhals v. Mains, 504 N.W.2d 233 (Minn.

Other Claims

Olson's other claims--intentional infliction of emotional distress, whistleblower, negligent hiring and retention, and tortious interference with contract--would require an even more searching inquiry into the church's and synod's motives, discipline and discharge procedures, and so forth, than would a contract claim and thus are improper under the First Amendment. See Singleton, __ N.W.2d at __.

App. 1993) (defamation action based on statements supporting decision to terminate membership in church barred); Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America, 860 F. Supp. 1194, 1198 (W.D. Ky. 1994) (minister's action against synod, alleging that synod employees made defamatory statements while resolving dispute between minister and his congregation, barred by First Amendment because the action was "the result of a conflict confined within the Reserrection Lutheran Church, concerning the employment relationship of its minister, and addressed in accordance with the church constitution."), aff'd 64 F.3d 664 (1995); Farlev v. Wisconsin Evangelical Lutheran Synod, 821 F. Supp. 1286, 1290 (D. Minn. 1993) (defamation claim would require court to review church's "base for terminating him, an ecclesiastical concern" and the truthfulness of the church's statements).

We conclude that the district court properly determined that Olson's claims are barred by the First Amendment. Thus, we need not determine whether there were any genuine issues of material fact.

Affirmed.

Dated: February 13, 1996

s/s
Judge Roland C. Amundson

STATE OF MINNESOTA

IN SUPREME COURT

C0-95-1623

Jeremiah Olson,

Appellant,

vs.

Luther Memorial Church,

Respondent,

and

St. Paul Area Synod of the Evangelical Church in America,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Jeremiah Olson further review be, and the same is, denied.

Dated: March 19, 1996

BY THE COURT:

s/ AM Keith
Chief Justice

F-1

(2)

Supreme Court, U.S.
FILED
AUG 30 1996
CLERK

No. 96-177

In the

Supreme Court of the United States

October Term, 1995

R. RAY SINGLETON,

Petitioner,

v.

CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

JEREMIAH OLSON,

Petitioner,

v.

LUTHER MEMORIAL CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

OPPOSITION BRIEF OF RESPONDENT CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH

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23 pp

QUESTIONS PRESENTED

1. Does the Establishment Clause of the First Amendment bar a civil court from adjudicating claims arising out of the appointment and discharge of a pastor and which are related to church governance.

2. Can the Supreme Court address issues which were not included in Petitioner's Questions Presented or raised in the lower courts.

LIST OF PARTIES

Petitioner Robert Ray Singleton
Respondent Christ the Servant Evangelical Lutheran Church
Respondent St. Paul Area Synod of the Evangelical Lutheran Church in America

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No. 96-177

In the
Supreme Court of the United States
October Term, 1995

R. RAY SINGLETON,

Petitioner,

v.

CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

JEREMIAH OLSON,

Petitioner,

v.

LUTHER MEMORIAL CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

OPPOSITION BRIEF OF RESPONDENT CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH

Respondent Christ the Servant Evangelical Lutheran Church respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Court of Appeals' opinion in this case. This opinion is reported at 541 N.W. 2d. 606.

OPINIONS BELOW

In *R. Ray Singleton v. Christ the Servant Evangelical Lutheran Church and St. Paul Area Synod of the Evangelical Lutheran Church in America*, the Ramsey County District Court granted Defendants' motions for summary judgment in an opinion dated April 28, 1995. The Minnesota Court of Appeals affirmed the District Court's opinion and dismissed the case in an opinion dated January 9, 1996 and published at 541 N.W.2d 606 (Minn. Ct. App. 1996). The Supreme Court of Minnesota denied Singleton's Petition for Review in an Order dated March 19, 1996.

STATEMENT OF THE CASE

Respondent Christ the Servant Evangelical Lutheran Church (the "Church") is a member of the Evangelical Lutheran Church in America ("ELCA"). The ELCA, one of the largest Lutheran churches in America, is a hierarchical church organization comprised of member synods and churches. The Church also is a member of the Respondent St. Paul Area Synod ("Synod").

In the fall of 1987, the Church extended, and Petitioner Robert Ray Singleton ("Petitioner") accepted, an offer to be the Church's pastor pursuant to a Letter of Call and in accordance with the Constitution of the Synod. In essence, a Letter of Call is an ecclesiastical offer of employment extended by a church congregation to a pastor. Because of the spiritual relationship between a pastor and his congregation, a pastoral call continues only as long as there is a mutual agreement between the pastor and his congregation.

Petitioner's Letter of Call, which is overtly religious in its terms, provides the basis for his breach of contract claim, and

is one of the documents Petitioner sought to have interpreted by the civil courts of the State of Minnesota.[1] Petitioner's Letter of Call illustrates why Petitioner was not a mere "employee" of the Church. The Letter of Call describes Petitioner's employment responsibilities at the Church in essentially religious terms as follows:

> You are to preach and teach the Word of God; to conduct public worship; to administer the sacraments; to provide pastoral care and leadership . . . and to perform all duties of the gospel ministry in accordance with the confession and order of the Lutheran Church in America and as become one called to that holy office. . . ."

From the fall of 1987 until early 1994, Petitioner served as pastor of the Church. Throughout his term as pastor, Petitioner had conflicts with several Church members concerning his leadership, factionalism in the church caused by Petitioner, the content of Petitioner's sermons, and other issues. In late 1993, the Church Council asked Petitioner to leave a Council meeting and respond to a list of concerns the Council had raised about his leadership. In November of 1993, the Church appointed a task force to investigate why Church members had stopped making financial contributions to the Church. At the task force meetings, Church members identified general and specific concerns about Petitioner's service as pastor. The concerns were so significant that the task force eventually appointed a mediator to attempt to resolve the concerns. At or around the same time, a dispute arose between Petitioner and the Church about Petitioner's

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[1] Petitioner also requested the District Court to interpret the Church Constitution.

salary.[2] Although the Church eventually approved the $42,000 compensation package Petitioner had requested, the Church was in a severe financial crisis.

More than six months before the Petitioner's relationship with the Church ended, Petitioner began searching for a new call and, by November of 1993, Petitioner had made a decision to leave the Church.

In early 1994, because of the serious conflicts that existed between many members of the Church and Petitioner, the newly-elected Church Council President, Lois McKeag, informed Petitioner by letter that she was prepared to ask him to resign with severance pay. After reviewing this letter, Petitioner never returned to active ministry at the Church.

On April 13, 1994, Petitioner commenced suit against the Church, asserting claims for breach of contract, wrongful discharge, promissory estoppel, breach of the implied covenant and fair dealing, defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. On April 28, 1995, the Ramsey County District Court granted summary judgment in favor of the Church on all claims. Petitioner appealed the decision to the Minnesota Court of Appeals, which affirmed in a decision filed January 9, 1996. The Minnesota Court of Appeals declined to review Petitioner's claims for breach of contract, wrongful discharge and promissory estoppel, holding that they "relate to his appointment and discharge as a pastor and are fundamentally connected to issues of church governance," and involve

---

[2] Petitioner's Letter of Call describes a compensation package which was subject to "annual review and amendment."

"strictly ecclesiastical concerns." *Court's Opinion at 7.* The Court concluded:

> Judicial review of Singleton's claims thus, would require an evaluation of scripture, doctrine and moral principles. This is precisely the type of searching inquiry that intrudes into church doctrine and church administrative matters and engenders a prohibited relationship between the Church and the judiciary.

Id.

The Court of Appeals also affirmed the entry of summary judgment on Petitioner's claims for breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress, noting that:

> Judicial inquiry into Singleton's implied covenant claims would excessively entangle the court in the internal affairs of the Church . . .[and] . . .[t]o determine whether the Church intended to cause Singleton emotional distress, a court would need to review the motivations for the Church's actions. The First Amendment prohibits judicial inquiry into motivation for a Church's pastoral employment decisions.

Id. at 13.

Petitioner filed a petition for discretionary review with the Minnesota Supreme Court seeking review of the decision of the Minnesota Court of Appeals. His petition was denied on March 19, 1996.

SUMMARY OF THE ARGUMENT

The Court should deny Singleton's Petition for a Writ of Certiorari because there is no compelling reason for review of the decision of the Minnesota Court of Appeals. The Minnesota Court of Appeals' decision is entirely consistent with a long line of decisions of the United States Supreme Court holding that the First Amendment prohibits excessive entanglement of the judiciary in matters relating to the appointment and discharge of a pastor and which are related to church governance. The Minnesota Court of Appeals correctly followed this Court's prior rulings in concluding that the neutral principles doctrine is inapplicable to this case because it is reserved for matters relating to church property disputes. There is no compelling reason for review because the decision of the Minnesota Court of Appeals does not conflict with the decisions of any state courts of last resort or federal circuit courts. Finally, Petitioner waived any claims based upon violation of his rights of due process and equal protection by failing to raise them in his questions presented and in the lower courts.

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD DENY SINGLETON'S PETITION FOR A WRIT OF CERTIORARI BECAUSE THE DECISION OF THE MINNESOTA COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT.

In affirming summary judgment and declining to review Petitioner's claims, the Minnesota Court of Appeals properly applied the decisions of this court, which hold that the First Amendment prohibits excessive entanglement of the judiciary

in matters that relate to the appointment and discharge of a pastor and which are related to church governance.

Since the Supreme Court decision in *Serbian Eastern Orthodox Diocese v. Milivojevich* in 1976, it has been black-letter law that civil courts cannot inject themselves into the relationship between a church and its pastor. It is well-established that civil courts are barred from reviewing "core" questions of church discipline, doctrine and governance because of the potential for excessive governmental entanglement. *Milivojevich*, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976). In *Milivojevich*, the United States Supreme Court held that the Illinois Supreme Court had "unconstitutionally undertaken the resolution of quintessentially religious controversies" when it overturned the decision of the Serbian Eastern Orthodox Church to suspend and defrock one of its bishops. *Milivojevich*, 426 U.S. at 721-23, 96 S. Ct. at 2385. The Supreme Court concluded that it was prohibited by the First Amendment from reviewing whether the Church had complied with its own laws and regulations when it removed the bishop. *Id.* at 2382.

Following *Milivojevich* and its progeny, in this case, the Minnesota Court of Appeals properly affirmed summary judgment and found court review of Petitioner's claims of breach of contract, wrongful discharge and promissory estoppel inappropriate because these claims "relate to his appointment and discharge as a pastor and are fundamentally connected to issues of church governance" and "involve strictly ecclesiastical concerns." *Court's Opinion at 7.* The court correctly noted that "adjudication of these claims would necessitate inquiry into the church's motives for proposing to decrease Petitioner's salary and for taking the other actions asserted by Petitioner as breaches of contract." *Id.* at 7. The Minnesota Court of Appeals' decision is consistent with this

Court's decision in *Milivojevich* and numerous opinions which have followed it. *See e.g. Scharon v. St. Luke's Episcopal Presb. Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991) (declining to review discrimination claim of ordained priest); *Young v. N. Illinois Conf. of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994), *cert. denied* 115 S. Ct. 320 (1994) (declining to review pastor's claims based on misapplication of church procedures and laws); *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940, 942-43 (6th Cir. 1992) (declining to intervene in employment dispute between church and clergy); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) (refusing to review claim related to minister's employment and status).

Contrary to Petitioner's assertion, this Court's decision in *General Council on Finance and Administration of the United Methodist Church v. Superior Court of California*, 429 U.S. 1355, 99 S. Ct. 35 (1978), does not provide support for court intervention in a pastor/church dispute. That case dealt with a "secular dispute" between third parties and a religiously affiliated organization involving a claim of fraud and this court expressly distinguished it from an intrachurch dispute. *General Council on Finance*, 429 U.S. at 1372-73, 99 S. Ct. at 38.

The Minnesota Court of Appeals also properly concluded that the neutral principles doctrine articulated by this Court in *Jones v. Wolf* is inapplicable to Petitioner's breach of contract claims. *See Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020 (1979). In *Jones*, one of two feuding factions of a church sought declaratory and injunctive orders concerning their right to possession and use of church property. The Supreme Court held that a "State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." *Jones*, 443 U.S. at 604, 99 S. Ct. at 3026. Since

Jones, this Court has never utilized neutral principles to adjudicate claims arising out of the relationship between a church and its pastor.[3] Accordingly, the Minnesota Court of Appeals' decision not to apply the neutral principles doctrine is completely consistent with this Court's decision in *Jones*.

Petitioner asserts that the "neutral principles" doctrine allows the Court to determine whether or not the Church adhered to its own procedures in terminating him. However, the neutral principles doctrine only permits a court to review non-doctrinal matters when "the analysis can be done in purely secular terms." *Minker v. Baltimore Annual Conference*, 894 F. 2d 1354, 1359-061 (D.C. Cir. 1990).

The Court of Appeals properly recognized that the neutral principles doctrine does not permit review in this case because the Church constitution is an ecclesiastical document, not a secular one, and it cannot be interpreted by a civil court without violating the Establishment Clause. Petitioner seeks to inject a civil court into the most delicate issues of religious faith and the spiritual relationship between a pastor and a congregation. If Petitioner's argument were accepted, then civil courts would have jurisdiction to interpret and apply ecclesiastical documents regarding church governance, a holding no court has accepted and a position directly at odds with the First Amendment. The Minnesota Court of Appeals found that "[e]ven if Minnesota law permitted a neutral principles of law analysis of a pastor's employment-related

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[3] In *Pilitech v. Deretich*, 328 N.W. 2d 696, 701 (Minn. 1982), the Minnesota Supreme Court extended the neutral principles doctrine of *Jones* to apply in church membership disputes. As the Court of Appeals properly held, this case involves neither a property dispute nor a membership dispute. *Court's Opinion at 8.*

claims, in this case the scriptural and other religious references in Petitioner's call letter and in the church's constitution "complicate secular analysis of the procedures described in those documents."[4] *Court's Opinion at 8.* As the Court properly noted:

> Judicial review of Singleton's claims, thus, would require an evaluation of scripture, doctrine and moral principles. This is precisely the type of searching inquiry that intrudes into church doctrine and church administrative matters and endangers a prohibitive relationship between the Church and the judiciary. . . .Singleton cannot prove his claims without asking the court to inquire into matters of ecclesiastical policy in the Church's constitution and in his letter of call. (Citations omitted.)

Id.

The decision of the Minnesota Court of Appeals is entirely consistent with both *Milivojevich* and *Jones* and thus Singleton's Petition for a Writ of Certiorari should be denied.[5]

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[4]
1. Petitioner's call letter discusses his spiritual obligations to the Church, including to 'preach and teach' the Word of God; to conduct public worship; to administer the sacraments; to provide pastoral care and leadership . . . .
2. Chapter 15 of the Church constitution addresses discipline of Church members and mandates that "prior to disciplinary action, reconciliation will be attempted following Matthew 18: 15-17."
3. The Church constitution states that the church-pastor relationship can be terminated if the pastor is disqualified on "grounds of doctrine, morality, or continued neglect of duty."

[5] In his brief, Petitioner does not address whether the Minnesota Court of Appeals properly dismissed his claim for defamation. Even if the Court

II. THERE IS NO COMPELLING REASON FOR REVIEW BECAUSE THE DECISION OF THE MINNESOTA COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF STATE COURTS OF LAST RESORT AND FEDERAL CIRCUIT COURTS.

The decision of the Minnesota Court of Appeals is consistent with the overwhelming weight of legal precedent that prohibits court intervention in a pastor/church dispute. State courts of last resort have consistently held that a church's decision to terminate its pastor is a purely ecclesiastical matter that may not be reviewed by a civil court. For example, in *Pierce v. Iowa-Missouri Conf. of Seventh-Day Adventists*, 534 N.W.2d 425 (Iowa 1995), the court declined to review any aspect of a church's termination of a ministerial intern even though, quite similarly to the instant case, the ministerial intern argued that the court could review the allegedly secular issue of whether the church followed its established procedures. *Pierce*, 534 N.W.2d at 427-28. Likewise, in *Smith v. State*, 899 S.W.2d 31 (Tex. Ct. App. 1995), the Court of Appeals of Texas held that a church's decision to terminate a minister's license could not be reviewed in spite of the minister's claim that the court could apply neutral principles of law to determine if the church violated its own rules. *Smith*, 899 S.W.2d at 31. Finally, in another recent decision, *Jocz v. Labor and Industry Review Com'n.*, 538 N.W. 2d 588 (Wis. Ct. App. 1995), the Wisconsin Court of Appeals affirmed the lower court's decision that it was constitutionally prohibited from reviewing a church's decision not to renew the contract of its director of field education. *Jocz*, 538 N.W.2d at 599.

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considers this issue, there is no conflict between the decision of the Court of Appeals and decisions of state courts of last resort, and this issue does not justify the granting of certiorari.

See also Sabatino v. Saint Aloysius Parish, 672 A.2d 217, 221 (N.J. Super. A.D. 1996) (refusing to decide principal's discrimination complaint against parish).

The cases cited by Petitioner do not demonstrate a conflict between state courts of last resort. In fact, the cases cited by Petitioner demonstrate that the law has been applied consistently and is clear: courts may not review the circumstances underlying the termination of a pastor's employment with a church. *See e.g., McElroy v. Guilfoyle*, 589 A.2d 1082, 1084-85 (N.J. Super. L. 1990) (court refused to hear pastor's claims because they were "replete with ecclesiastical issues"); *Gillespie v. Elkins Southern Baptist Church*, 350 S.E. 2d 715, 719 (W.Va. 1986) (court could not decide pastor's wrongful discharge claim because it would almost "inevitably" require the court to inquire into church doctrine).

None of the other cases cited by Petitioner hold that a court can review a pastor's claims under circumstances similar to the instant case. *See, Bacher v. Metcalf*, 611 So.2d 1030, 1031 (Ala. 1992) (church agreed to court review and church members initiated action); *Fellowship Tabernacle, Inc. v. Baker*, 869 P.2d 578, 579 (Idaho Ct. App. 1994) (church instituted action and sought injunctive relief). *See also Lily of the Valley Spiritual Church v. Sims*, 523 N.E.2d 999, 1001 (Ill. Ct. App. 1 Dist. 1988); *First Union Baptist Church v. Banks*, 533 So.2d 1305, 1307 (La. Ct. App. 3 Cir. 1988). Two cases erroneously cited by Petitioner do not even address the issue of whether the court's review would impinge upon the church's First Amendment rights. *Robinson v. Davis*, 511 N.Y.S.2d 311 (A.D. 2 Dept. 1987); *Feldbin v. Temple Beth-El of Manhattan Beach*, 620 N.Y.S. 2d 113 (A.D. 2 Dept. 1994).

The Court of Appeals' decision also is consistent with the great weight of precedent from the federal circuit courts on this issue. *See, e.g. Scharon v. St. Luke's Episcopal Presb. Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991); *Young v. N. Illinois Conf. of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994); *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940, 942-43 (6th Cir. 1992); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Hutchinson v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 277 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church*, 860 F. Supp. 1194, 1199 (W.D. Ky 1994), aff'd 64 F.3d 664 (6th Cir. 1995).

III. PETITIONER WAIVED ANY CLAIMS FOR VIOLATION OF HIS RIGHTS OF DUE PROCESS AND EQUAL PROTECTION BY FAILING TO RAISE THESE CLAIMS IN HIS QUESTIONS PRESENTED AND IN THE LOWER COURTS.

Supreme Court Rule 14 expressly states that, "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). The questions set forth by Petitioner in his petition for a writ of certiorari do not refer to claims under the due process clause or the equal protection clause. Moreover, Supreme Court Rule 24 provides that "the brief may not raise additional questions or change the substance of the questions already presented in those documents." Sup. Ct. R. 24.1(a). Thus, Petitioner is barred from raising due process and equal protection arguments which were not included in his questions presented.

Petitioner likewise never raised these issues in the lower court. This Court has consistently held, that absent the most unusual circumstances, the court will not consider issues not raised or decided in the lower courts. *See, e.g. Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S. Ct. 2172, 2182-83 (1995); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 114 S. Ct. 1599, 1605 (1994); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46, 112 S. Ct. 1644 (1992); *Hudson v. McMillian*, 503 U.S. 1, 12, 112 S. Ct. 995, 1002 (1992).

Petitioner has not provided any legal basis to justify this Court's consideration of new issues. Accordingly, Petitioner's claims for violation of his rights of due process and equal protection do not warrant this Court's granting of certiorari.

CONCLUSION

For the reasons set forth hereinabove, Respondent Christ the Servant Evangelical Lutheran Church respectfully requests that the Petition of Robert Ray Singleton for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 96-177

In the
Supreme Court of the United States
October Term, 1995

R. RAY SINGLETON,

Petitioner,

vs.

CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

JEREMIAH OLSON,

Petitioner,

vs.

LUTHER MEMORIAL CHURCH, AND THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

RESPONDENT THE SAINT PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

R. Ray Singleton v. Christ the Servant Evangelical Lutheran Church and The Saint Paul Area Synod of the Evangelical Lutheran Church in America

I.

Whether the Minnesota Court of Appeals properly determined that Petitioner Singleton's claims for tortious interference with contract and breach of implied covenant of good faith and fair dealing are constitutionally barred by the First Amendment?

II.

Whether the Minnesota Court of Appeals properly affirmed summary judgment in favor of the Saint Paul Area Synod where the Synod's alleged defamatory statement was conditionally privileged and Petitioner Singleton failed to present evidence of malice?

Jeremiah Olson v. Luther Memorial Church and The Saint Paul Area Synod of the Evangelical Lutheran Church in America

I.

Whether the Minnesota Court of Appeals properly determined that Petitioner Olson's claims of tortious interference with contract and defamation are constitutionally barred by the First Amendment?

II.

Whether the Minnesota Court of Appeals properly determined that Minnesota does not recognize a cause of action for implied covenant of good faith and fair dealing in employment disputes?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.6, Respondent The Saint Paul Area Synod of the Evangelical Lutheran Church in America, states that it is a Minnesota non-profit corporation which has no parent or subsidiary company.

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No. 96-177

In The
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R. RAY SINGLETON,

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CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH, and, THE SAINT PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

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On Petition for a Writ of Certiorari
to the Minnesota Court of Appeals

RESPONDENT THE SAINT PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, The Saint Paul Area Synod of the Evangelical Lutheran Church in America, respectfully requests this Court deny the petition for writ of certiorari of R. Ray Singleton and Jeremiah Olson which seeks review of the opinions issued in these cases by the Minnesota Court of Appeals.

OPINIONS BELOW

R. Ray Singleton v. Christ the Servant Evangelical Lutheran Church and The Saint Paul Area Synod of the Evangelical Lutheran Church in America, Ramsey County District Court No, C6-94-5824, Order and Memorandum, April 28, 1995 is contained in Petitioner's Appendix at A-1. The Minnesota Court of Appeals decision in R. Ray Singleton v. Christ the Servant Evangelical Lutheran Church and The Saint Paul Area Synod of the Evangelical Lutheran Church in America, is reported at 541 N.W.2d 606 (Minn. Ct. App. 1996) and contained in the Petitioner's appendix at B-1. The unpublished Minnesota Supreme Court Order dated March 19, 1996, denying Petitioner Singleton's petition for review is contained in the Petitioner's Appendix at C-1.

Olson v. Luther Memorial Church and The Saint Paul Area Synod of the Evangelical Lutheran Church in America, Ramsey County District Court Number C6-94-8853, Order and Memorandum, June 27, 1995, is contained in Petitioner's Appendix at D-1. Olson v. Luther Memorial Church and The Saint Paul Area Synod of the Evangelical Lutheran Church in America, CO-95-1623, Minn. Ct. App. February 20, 1996, is an unpublished decision of the Minnesota Court of Appeals and contained in the Petitioner's Appendix at E-1. The unpublished Minnesota Supreme Court Order dated March 19, 1996, denying Petitioner Olson's petition for review is contained in the Petitioner's Appendix at E-1.

JURISDICTION

This Court cannot properly exercise jurisdiction under 28 U.S.C. § 1257 over the arguments presented in sections III and IV of the Petitioners' petition for writ of certiorari as these issues were not presented to or considered by the Minnesota Courts. In addition, this Court may not properly exercise jurisdiction over Singleton's defamation claim or Olson's implied covenant of good faith and fair dealing claim as they do not meet the requirements of 28 U.S.C. § 1257(a).

28 U.S.C. § 1257(a) confers jurisdiction to this Court only over the issues addressed by the Minnesota Court of Appeals relating to the Establishment Clause of the First Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED[1]

The First Amendment of the United States Constitution:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

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[1] Petitioners also include reference to the Fifth Amendment and the Fourteenth Amendment. As noted, these issues were not raised before either the trial court or the Minnesota Court of Appeals and are not properly before this Court.

STATEMENT OF THE CASE

Background of the Evangelical Lutheran Church in America and its Synods[2]

The Evangelical Lutheran Church in America ("ELCA") began operating as a religious organization on January 1, 1988. The ELCA is governed by its constitutions, bylaws and resolutions.

The Synods and the congregations each adopt their own constitutions which are modeled after constitutions provided by the ELCA. Those documents provide guidance, direction and assistance to the ELCA, synods and congregations in their search for the understanding of the nature of the Lutheran church.

Each individual congregation affiliated within a Synod is largely autonomous. Congregations have considerable freedom to conduct their own ministries and to hire and fire their own staffs.

The ordained ministry of the ELCA is carried on primarily by pastors employed by congregations. According to the constitution:

> A pastor as an ordained minister of this church shall be a person whose commitment to Christ, soundness in the faith, aptness to preach, teach, and witness, and educational qualifications have been examined and approved in the manner prescribed in the documents of this church; who has been properly called and ordained; who accepts and adheres to the Confession of Faith of

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[2] Both Singleton and Olson initiated claims against The Saint Paul Area Synod. The Synod provides a short background on the Evangelical Lutheran Church of America and the Synod for the Court's reference in both cases.

this church; who is diligent and faithful in the exercise of the ministry; and whose life and conduct are above reproach. . . .

A Pastor's call

When a congregation affiliated with the ELCA searches for a new pastor, it may "call" any of the 17,000 pastors on the ELCA clergy roster. A letter of call is essentially an ecclesiastical offer of employment. The call may be extended for an indefinite or a stated period of time. The call continues as long as a mutual agreement exists between the pastor and the congregation. In the letter of call, the congregation sets forth the duties and responsibilities it expects of the pastor as well as a statement of the congregation's financial and other commitments to the pastor. A pastor may freely accept or reject a letter of call.

To facilitate a congregation's search for a pastor and a pastor's search for a new call, the Synod typically acts as a "matchmaker" in the call process. A pastor who is searching for a new call usually notifies the Synod. A congregation with a vacancy also notifies the Synod, and representatives of the Synod meet with leaders of the congregation to help assess the congregation's needs. The Synod provides the congregation with names of pastors who appear to meet those needs.

The congregation itself decides whether to interview or call candidates suggested by the Synod. The final decision whether to issue a letter of call to a particular candidate is made by vote of the members of the congregation, not the Synod. The Synod has no authority to force a congregation to extend a call to a pastor; prevent a congregation from extending a call to a pastor; or force a pastor to accept or reject a call.

The relationship between pastor, congregation and synod.

A pastor of an ELCA congregation is paid by the congregation, out of the congregation's own funds, in an amount and at intervals determined by the congregation. Although some synods provide pastor salary guidelines, those guidelines are not binding. Pastors may be paid more than the suggested guidelines, and others may be paid less. The congregation determines what benefits the pastor will receive upon accepting a congregation's call.

A pastor's admission to the ELCA clergy roster requires an ordination, which is a prescribed ecclesiastical function. However, no one can be ordained a pastor of the ELCA unless he or she first receives and accepts a call from a congregation. Being ordained merely connotes that one has a "ecclesiastical license" to act as a pastor within the ELCA; it does not guarantee employment as a pastor.

The Synod is authorized to initiate ecclesiastical disciplinary proceedings if, for example, the pastor preaches in conflict with the faith confessed by the ELCA or commits certain types of serious misconduct. The Synod cannot terminate a pastor's employment with the church; only the congregation has the authority to terminate a pastor's employment.

The Synod's primary role in the Lutheran church is to provide "pastoral care" for the congregations and pastors in its territory. To fulfill this role, the Synod nurtures and supports the congregations and lay leaders; seeks and recruits qualified pastors; provides pastoral care and guidance; and provides support for the pastors on the clergy roster.

A synod's bishop acts as a "pastor to the pastors". This role includes providing ecumenical guidance and encouragement to the pastor; developing new ministries or assisting in the conclusion of others; providing leadership and

encouragement to the pastors; and assisting pastors in carrying out their ministries.

R. Ray Singleton - Background Facts

Singleton began his work as pastor of Christ the Servant on August 18, 1987, when the council and congregation extended him a call. Christ the Servant is a congregation within the jurisdiction of the Saint Paul Area Synod of the Evangelical Lutheran Church in America (the "Synod"). Bishop Lowell Erdahl was the presiding bishop at all relevant times.

Singleton experienced conflicts and personality differences with church members within his first year at Christ the Servant. In addition, during Singleton's tenure, Christ the Servant experienced financial difficulties and the church was required to reduce Singleton's salary in 1993 to make its mortgage payments.

On November 19, 1993, Singleton informed Bishop Erdahl that he must leave Christ the Servant and would do so if he found a another call.

In December 1993, concerned members of the congregation held "Task Force" meetings to investigate the problems at Christ the Servant. In part, the task force recommended that Singleton be relieved of administrative duties to enable him to resume his duties as spiritual leader and that a meeting be arranged to allow Singleton to meet with former members and disgruntled present members to resolve their differences. There were no Synod representatives at the task force meetings.

The President of Christ the Servant personally wrote Singleton in January 1994 indicating the church could not afford to pay its mortgage and his salary, and therefore, he

should resign. Singleton never returned to Christ the Servant after January 11, 1994.

Singleton Procedural History

Singleton initiated this action against respondents on April 8, 1994, alleging the following causes of action against the Synod: 1) tortious interference with employment; 2) implied covenant of good faith and fair dealing; and 3) defamation.

Singleton asserts in his Statement of the Case that he asserted a breach of contract claim against the Synod. This statement is misleading. The Ramsey County District Court and the Minnesota Court of Appeals did not address a breach of contract claim against the Synod. Singleton acknowledged no breach of contract claim existed against the Synod prior to the trial court's ruling.

The Synod brought a motion for summary judgment on February 28, 1995, before the Honorable Kathleen Gearin of the Ramsey County District Court on the basis that Singleton's claims are barred by the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution. On May 2, 1995, judgment was entered in the Ramsey County District Court granting both the Synod's and Christ the Servant's motions for summary judgment on the basis that the relationship between Singleton and respondents was "basically a religious one", and therefore, the claims are constitutionally barred from review.

Singleton appealed the trial court's Order. The Minnesota Court of Appeals affirmed the trial court, holding Singleton's claims for tortious interference with contract and implied covenant of good faith and fair dealing are constitutionally barred and that the alleged defamatory statements made by the Synod are conditionally privileged.

Jeremiah Olson - Background Facts

Luther Memorial Church ("Luther Memorial") extended Olson a Letter of Call on July 1, 1990. Olson accepted Luther Memorial's call and began work on August 1, 1990, even though he had concerns that his salary was below Synod guidelines.

Luther Memorial is a congregation within the jurisdiction of the Saint Paul Area Synod of the Evangelical Lutheran Church in America. Bishop Lowell Erdahl was the presiding bishop at all relevant times.

During the 1991-92 year, the Luther Memorial finance committee approved a wage freeze for all church employees due to the congregation's financial difficulties.

By December 1991, Olson determined he was open to a call at another congregation, in part, because he was experiencing personality conflicts with Luther Memorial's senior pastor. During a December 1991 meeting, Bishop Erdahl told Olson he was being "obsessive/compulsive" about his continuing conflict with the senior pastor.

On April 25, 1992, Olson wrote the Luther Memorial Support Committee that he felt his position at Luther Memorial was "threatened". At a May meeting, members of the committee asked Olson to resign. No Synod representative was present at that meeting.

On October 18, 1992, Luther Memorial held its annual congregational meeting. During the meeting, a motion was made to eliminate Olson's Assistant Pastor position due to financial shortages. The resolution was introduced and approved. Bishop Erdahl was not present at the meeting.

Olson gave his last sermon at Luther Memorial on October 25, 1992. Olson left the pulpit in the middle of the sermon and never returned to the church.

Olson Procedural History

On June 24, 1994, Olson initiated this action against Luther Memorial, and the Saint Paul Area Synod. Appellant alleges only the following causes of action against the Synod: 1) tortious interference with employment; 2) implied covenant of good faith and fair dealing; and 3) defamation.

Olson asserts in his Statement of the Case that he asserted a breach of contract claim against the Synod. This statement is misleading. The Ramsey County District Court and the Minnesota Court of Appeals did not address a breach of contract claim against the Synod. Olson acknowledged no breach of contract claim existed against the Synod prior to the trial court's ruling.

The Respondents brought a motion for summary judgment before the Honorable Allan R. Markert of the Ramsey County District Court on May 16, 1995, on the basis that Olson's claims are barred from review by the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution and that Olson failed to present specific facts showing a genuine issue of material fact in support of his claims. Judgment was entered on July 3, 1995, in the Ramsey County District Court granting the Respondents' motions for summary judgment.

Olson appealed the trial court's order. The Minnesota Court of Appeals affirmed the trial court's order in favor of the Synod on the basis that Olson's claims for tortious interference with contract and defamation were constitutionally barred by the First Amendment and that Minnesota does not recognize a cause of action for implied covenant of good faith and fair dealing in employment disputes.

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAILED TO PETITION THIS COURT TO REVIEW THE CLAIMS AGAINST THE SYNOD.

Although Petitioners purport to petition this Court for review of their claims against the Synod, a careful reading of the Petition makes clear Petitioners seek review of their contract claims against the respective churches and not the claims against the Synod. Rather, Petitioners attempt to group all of the claims against the respective churches and the Synod together.

The claims against the Synod are separate and distinct from the claims against either Church. The claims against the Synod include only: 1) tortious interference with contract; 2) defamation; and 3) breach of implied covenant of good faith and fair dealing.[3] No where in the Petitioners' arguments do you find reference to these claims. On page 8 of the Petition under "Reasons for Granting the Writ", Petitioners state the "question before the Court is whether the employment contracts of a church are enforceable." This theme resounds throughout the Petition (See page 12, "Neutral Principles Doctrine Allows the State of Minnesota to Recognize a Breach of Contract Claim by a Pastor against a Church"; page 14, "Neutral Principles Doctrine Allows the State of Minnesota to recognize Tort Claims by a Pastor against a Church"; page 16, civil courts retain jurisdiction to hear non-doctrinal contract disputes.)

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[3] Although petitioners pled claims of breach of contract against the Synod initially in their Complaints (see Petition, pg. 6 and 8), they later recognized no such cause of action existed against the Synod. The only claims against the Synod reviewed by the lower courts are the three listed.

Petitioners have given this Court no reason to review the claims asserted against the Synod.

II. SOME OF PETITIONERS' CLAIMS WERE DISMISSED ON THE BASIS OF MINNESOTA LAW AND PRESENT NO FEDERAL QUESTIONS, AND THUS, THERE IS NO REASON FOR THIS COURT TO REVIEW THE ISSUES FURTHER.

Petitioners mischaracterize the Minnesota Court of Appeals decisions to this Court by presenting an all encompassing statement that the Court of Appeals "based its decisions in both cases on the Establishment Clause of the United States Constitution."[4] That statement is patently false and misleading -- again, the result of Petitioners' presentation of their claims as one.

In Singleton, the court of appeals ruled the trial court properly granted the Synod summary judgment on the defamation claim because the alleged defamatory statements were conditionally privileged and there was no evidence of malice. The Court of Appeals never reached the issue of whether the claim was barred by the First Amendment.

In Olson, the court of appeals affirmed the trial court's order for summary judgment as it related to Olson's implied covenant of good faith and fair dealing claim because Minnesota does not recognize this cause of action. Again, the dismissal was not based upon the First Amendment.

Since the above dismissed claims do not present federal questions and were decided strictly upon established Minnesota law, this Court has no jurisdiction under 28 U.S.C. § 1257(a) to review them.

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[4] Petition, pg. 8.

III. THE MINNESOTA COURT OF APPEALS PROPERLY FOUND THE REMAINDER OF PETITIONERS' CLAIMS CONSTITUTIONALLY BARRED BY THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

U.S. Const. amend. I. The First Amendment has long been interpreted to guarantee that the government may not establish any religion through government action, or excessively entangle government (including the courts) with the free exercise of religion. Serbian Eastern Diocese v. Milivojevich, 426 U.S. 696 (1976).

The court of appeals acknowledged courts may intervene in disputes between church members through the application of "neutral principles" of law. Jones v. Wolf, 443 U.S. 595, 603 (1979)(emphasis supplied). This Court defines a "neutral principle" of law as any method that "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges," and that "promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice." Jones, 443 U.S. at 603.

However, the Jones court conceded that "if in such a case the interpretation of the instruments of [property] ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issues by the authoritative ecclesiastical body." Id. at 604 (citing Milivojevich, 426 U.S. at 709). The application of "neutral principles" may never be used in any manner that may

infringe upon the spheres of church autonomy. Jones, 443 U.S. at 602.

Petitioners continue to rely upon Piletich v. Deretich, 328 N.W.2d 696 (Minn. 1983) in support of their position that this case can be decided on "neutral principles" of law. The lower courts properly found petitioners reliance was misplaced. Piletich addressed a property dispute, not the interaction between a Synod and one of its pastors. The issues there were determined by interpreting legal concepts of trust and property law not, for example, the meaning of "pastoral care". Moreover, the court of appeals stated that "neutral principles" could not be applied because "judicial review of Singleton's claims .. would require an evaluation of scripture, doctrine and moral principles."

Here, the Minnesota Court of Appeals followed Milivojevich, and determined the courts would necessarily become entangled in the religious controversy between petitioners and the Synod if the cases were further reviewed. The result reached by the court of appeals is consistent with the decisions of this Court, as well as other federal decisions which restrict a court's intrusion into issues relating to a religious organization's relationship with one of its pastors. See, e.g., Young v. N. Illinois Conf. of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994)(plaintiff's claims of race and gender discrimination dismissed because "civil court review of ecclesiastical decisions of church tribunals . . . are in themselves an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment" (emphasis in original)); Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940, 942 (6th Cir. 1992)("civil court jurisdiction over a ministerial employment dispute [is] impermissible because such state intervention would excessively inhibit religious liberty"); Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 363 (8th Cir.

1991) (priest's discrimination claims dismissed because "[i]t is not only the conclusions [of the court] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry."); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1356-1357 (D.C. Cir. 1990) (evaluation of the gifts and graces of a minister must be left to ecclesiastical institutions); Natal v. Christian and Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989) (minister's wrongful termination suit dismissed because "civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice"); McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972)(matters such as selecting a minister, determination of a minister's salary, place of assignment, and the duty a minister is to perform, are all matters of church administration and government, and thus, are barred from review).

The Minnesota Court of Appeals decisions are also consistent with other Minnesota decisions addressing similar disputes. See, e.g., Black v. Snyder, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991), review denied (Minn. August 29, 1991); Geraci v. Eckankar, 526 N.W.2d 391 (Minn. Ct. App. 1995), review denied (Minn. Mar. 14, 1995), cert. denied, 116 S.Ct. 75 (1995); Basich v. Board of Pensions (ELCA), 540 N.W.2d 82 (Minn. Ct. App. 1995), review denied, (Minn. January 25, 1996), cert. pending. Further review is not warranted.

A. Singleton's claims of tortious interference with contract and implied covenant of good faith and fair dealing were properly dismissed.

1. Tortious Interference with Contract.

In Minnesota, a claim for tortious interference with an employment contract exists where someone "intentionally and

improperly interferes" with a contract. Nordling v. Northern States Power Co., 478 N.W.2d 498, 506 (Minn. 1991). To recover for "tortious interference" a party must prove: 1) the existence of a contract; 2) the alleged wrongdoers knowledge of the contract; 3) intentional procurement of a breach; 4) without justification; and 5) damages resulting therefrom. Royal Realty Co. v. Levin, 244 Minn. 288, 292, 69 N.W.2d 667, 671 (1955).

The court of appeals in Singleton accurately held that in order to analyze the justification element of the cause of action, a court would have to determine whether the Synod acted reasonably. Such an analysis would require a court to determine the "pastoral role" of a bishop in the call process, question the decisions of the bishop and his staff, review the relationship between the Church and the Synod, interpret the ELCA constitution, and determine the Synod's obligations and authority to settle disputes with its member churches. B-14. The court of appeals found such review impermissible.

2. Implied Covenant of Good Faith and Fair Dealing.

The court of appeals properly noted that Minnesota has not recognized a claim for implied covenant of good faith in employment contracts. Hunt v. IBM Mid-America Employees Fed. Credit Union, 384 N.W.2d 853, 858 (Minn. 1986). The court concluded judicial inquiry into Singleton's claim would necessarily "entangle the court in the internal affairs" of the Synod. B-12. Petitioner Singleton has presented nothing to persuade this Court that the court of appeals improperly interpreted Minnesota law on this claim.

Reviewing this claim would require the Court to determine the level of pastoral care a bishop is required to give each pastor. To do so, a civil court would need to scrutinize the laws and constitution of the ELCA and the Synod, and the

ecclesiastical conduct of the bishop and his assistants. The ELCA constitution sets forth the Synod's relationship with its congregations and pastors, and further establishes the limited authority of the Synod. The bishop and his staff are limited to an ecclesiastical role in matters of the congregation. Most importantly, further review would, in effect, allow the court to define the relationship between the Synod and its pastors. The court of appeals in Singleton properly determined such review would unnecessarily entangle the court in the Synod's internal affairs. Further review is not necessary.

B. Olson's claims of tortious interference with contract and defamation were properly dismissed.

1. Tortious Interference with Contract.

The court of appeals properly determined that review of Olson's claim for tortious interference would require a "searching inquiry" into the Synod's motives, disciplinary and discharge procedures, and thus, could not be reviewed under the First Amendment.

Olson alleged the following Synod actions constituted a basis for his interference with employment claim: 1) failing to exercise "appropriate pastoral care and duties in accordance [with] the constitution"; 2) failing to offer him more aid and assistance; 3) failing to inform the church that their resolutions were not "in order" and against the Constitution, 4) failing to remind the congregation to follow the Constitution, 5) requesting that he resign from Luther Memorial, 6) suggesting that he undergo counseling, and 7) keeping his name out of the call process.

A review of Olson's allegations show they all center directly on his relationship with the Synod and its staff. Olson now questions nearly every action the Synod took when addressing his concerns about his employment relationship

with Luther Memorial. The "pastoral" relationship between the Synod and Olson is derived from the ELCA Constitution. The "pastoral care" Olson questions is the crux of the relationship between a Pastor and the Synod. The court of appeals properly determined review of this relationship is impermissible.

2. Defamation claim.

The court of appeals found that review of Olson's defamation claim against the Synod would require review of statements which relate to the Synod's "reasons and motives for making employment decisions", and thus, were barred by the First Amendment.

Olson claimed the Synod defamed him when Bishop Erdahl stated he was "obsessive-compulsive" about his conflict with the senior pastor of the Church. This observation was made during a meeting between Bishop Erdahl and Olson concerning Olson's desire to obtain another call. Olson's interest in another call arose in part because of his conflict with the senior pastor.

The court of appeals followed prior Minnesota decisions in determining review would be impermissible. See, Black, 471 N.W.2d at 720, (review of the pastor's defamation claim would require an impermissible entanglement of doctrinal and disciplinary issues); Schoenthals v. Mains, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993)("since examination of the truth of Mains' statements would require an impermissible inquiry into Church doctrine and discipline, the district court did not err in concluding that the defamation claim is precluded by the First Amendment.") - See, also, Farley v. Wisconsin Evangelical Lutheran Synod, 821 F.Supp. 1286, 1290 (D. Minn. 1993)(review of defamation claim would require court to review the reason for termination as well as the veracity of the statements); and Hutchinson v. Thomas, 789 F.2d 392, 396

(6th Cir.), cert. denied, 479 U.S. 885 (1986) (claim involving defamation relates to the plaintiff's status and employment as a minister of the church, and therefore concerns "internal church discipline, faith and organization, all of which are governed by ecclesiastical rule, custom and law".)

Here, the court of appeals in Olson properly determined review was impermissible. To determine the context, validity or truth of the alleged defamatory statement in this case, a court would be required to probe the ecclesiastical relationship between the staff of the Synod, the members of the congregation and petitioner. The court would necessarily review the Synod's motives for speaking with the congregation regarding its pastor. This type of review is not permitted as it would require excessive entanglement barred by the Establishment Clause.

IV. THIS COURT HAS NO JURISDICTION TO HEAR PETITIONERS' ARGUMENTS RELATING TO DUE PROCESS AND EQUAL PROTECTION.

For the first time in this Petition, the Petitioners present an argument that they are being denied due process and equal protection by the Minnesota court's application of the Establishment Clause to their claims. Petitioners claim the dismissal of their claims has denied them access to the court system and thus taken away their ability to enforce contractual obligations.[5] These novel arguments were not presented to the state trial court or the Minnesota Court of Appeals.

This Court has refused, except in rare circumstances, to review issues not raised or addressed below. Illinois v. Gates,

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[5] These arguments have no merit as they relate to the Synod. The petitioners have no contractual obligations with the Synod to enforce in a court of law.

462 U.S. 213, 218-20 (1983); Yee v. Escondido, 503 U.S. 519, 533 (1992). This court should similarly refuse to review any questions raised for the first time in the Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, Respondent The Saint Paul Area Synod of the Evangelical Lutheran Church in America respectfully requests the Petition of R. Ray Singleton and Jeremiah Olson for Writ of Certiorari be denied.

Respectfully Submitted,

Dated: August 30, 1996

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No. 96-177

In the
Supreme Court of the United States
October Term, 1995

R. RAY SINGLETON,

Petitioner,

vs.

CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

JEREMIAH OLSON,

Petitioner,

vs.

LUTHER MEMORIAL CHURCH, AND THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the decision that the Establishment Clause bars civil review of a hierarchical church's relationship with its minister which would require interpretation of organic internal documents governing church polity.

2. Whether the limited neutral principles exception to determine property disputes between church factions is applicable to this ecclesiastical dispute between a hierarchical Church and its minister.

3. Whether this Court may review Petitioner's Due Process and Equal Protection Arguments neither presented to nor passed upon by state courts below.

4. Whether Due Process and Equal Protection arguments should be summarily dismissed on the strength of First Amendment protection against civil intrusion into church governance and polity.

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No. 96-177

In the
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R. RAY SINGLETON,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Respondent Luther Memorial Church prays that this Court decline to grant a writ of certiorari and refuse to review the Order of the Minnesota Court of Appeals which affirmed the summary judgment of the District Court for Ramsey County, Minnesota, in favor of Luther Memorial Church in the case of Olson v. Luther Memorial Church, and St. Paul Area Synod of the Evangelical Lutheran Church in America.

OPINION BELOW

In Jeremiah Olson v. Luther Memorial Church, a Minnesota Religious Corporation, and the St. Paul Area Synod of the Evangelical Lutheran Church in America, (hereinafter referred to as Olson), the Minnesota Court of Appeals affirmed the District Court's Opinion on February 20, 1996. The Minnesota Court of Appeals upheld the District Court's dismissal of Petitioner Olson's claims by finding review would involve excessive entanglements in matters of church governance. Further, it affirmed the District Court on several of Petitioner Olson's claims because there were no genuine issues of material fact. PA at E-2. The Minnesota Supreme Court denied Petitioner Olson's Petition for Review by Order dated March 19, 1996. PA at F-1.

STATEMENT IN OPPOSITION TO JURISDICTION

As stated above, the Minnesota Supreme Court denied the Petition for Review by Order dated March 19, 1996. PA at E-2 and F-1. Pursuant to Rule 13 of the Supreme Court Rules, the Petitioners' combined petition for writ of certiorari must be filed within 90 days after entry of those Orders which denied discretionary review.

Upon information and belief, the Petition for Certiorari may not have been served in a timely manner upon the Clerk of the Supreme Court. Certainly, the Affidavit of Personal Service upon this counsel is incorrect in that it alleges personal service was made upon counsel for Luther Memorial Church on June 17, 1996. In fact, personal service was made one day later on June 18, 1996, which was more than 90 days following the Minnesota Supreme Court Order denying discretionary review. As a result, timeliness of the service upon the Court is also suspect.

Pursuant to 28 U.S.C. § 1257, this Court may review the Order of the Minnesota Court of Appeals and issues considered by the Court in that Order. Supreme Court precedent and corresponding Minnesota case law require parties to raise issues at lower courts before they may be reviewed at the appellate level. Here, the Petitioner has raised new and additional arguments based upon Due Process and Equal Protection which were neither presented nor argued to the Minnesota courts. As a result, this Court has no jurisdiction to consider Petitioner's new and additional theories founded upon Due Process and Equal Protection. Alternatively, based upon considerations of comity and practicality, this Court should not review the new and additional theories raised for the first time.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, § 16 of the Minnesota Constitution states:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with

the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

STATEMENT OF THE CASE

Petitioner Jeremiah Olson ("Olson") began his duties as Assistant Pastor at Luther Memorial Church ("the Church") on August 1, 1990, pursuant to a "call letter" issued by the Church. A letter of call is an ecclesiastical offer of employment from a congregation to the pastor.[1] The call was to continue as long as the Pastor and the congregation mutually agreed and was therefore an "at will" employment relationship. In attachments to the letter of call, the congregation sets forth the duties and responsibilities it expected, as well as a statement of the congregation's financial and other commitments to the Pastor. Olson was free to accept or reject the letter of call.

He hesitated to accept the Church's call primarily because he thought he wasn't being offered enough money. In fact, just

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[1] The Letter of Call begins:

> In the Name of the Father, and of the Son, and of the Holy Spirit, Amen. Jeremiah Olson, with prayers for the guidance of the Holy Spirit to do God's will, Luther Memorial Church, at a meeting held on July 1, 1990, called you to serve as Assistant Pastor of Life and Growth of Luther Memorial Church. We call you to exercise the office of the Word and Sacrament in a mutual relationship....for the sake of our ministry in Christ's name.

two months after he accepted the call, at the Church's annual budgetary meeting, Olson informed the congregation that his pay wasn't up to Synod guidelines. This event paints the financial picture of Olson's tenure at the Church.

Olson also felt that the Senior Pastor, Tom Burtch, was hostile to him. Shortly after he began his duties, Olson claims he became aware of a number of rumors concerning Pastor Burtch. Although Olson was less than clear in his deposition, apparently there were allegations that Pastor Burtch had homosexual relations, that he had sold drugs and liquor to underage boys, that he used alcohol to excess, and that he had used illegal drugs. This conduct supposedly occurred many years ago. However, Olson also insinuated that some of this behavior was continuing. He expressly made clear that he had no personal knowledge of the truth of these rumors and never witnessed any of the reported misbehavior. Olson acted on unsubstantiated rumor--a rumor so tenuous that he did not believe it triggered state statutory reporting requirements.

Olson reported the rumors of Pastor Burtch's misconduct to Synod Bishop Lowell Erdahl. Olson believed that Bishop Erdahl inappropriately refused to act upon his report, so he took the rumors to the Bureau of Criminal Apprehension ("BCA"). The BCA contacted Dakota County authorities who investigated the allegations. The investigation could substantiate none of the alleged illegal activity.

In October 1992, the Church found itself in the midst of an extreme financial crisis. Expenses had exceeded receipts by over $30,000.00 for the 1991-92 fiscal year. The Church had negative balances in its general checking account in five of the nine financial quarters Olson was an Assistant Pastor. In total, the working funds available to the Church, which are its general checking account and contingency monies, declined from a total of approximately $39,500.00 in August 1990 to $7,500.00 by October 1992.

The budget had to be cut to staunch the flow of red ink. The Board of Trustees reviewed the budget and determined that the Assistant Pastor position was a luxury the congregation could no longer afford. It presented a resolution to the congregation recommending elimination of that position. Although Olson will not believe that the Church faced a financial crisis, he has never challenged the validity of the data assembled by the Board of Trustees.

At a regularly scheduled congregational meeting held on October 18, 1992, the congregation voted to eliminate the position of Assistant Pastor.[2] The Church has not recreated the position of Assistant Pastor and has no plans to do so.

On October 25, 1992, Olson left the pulpit in the middle of his sermon and did not return. The Church offered him a severance package which Olson accepted and received for approximately one year. From February 14, 1993, through the summer of 1994, Olson worked as an Interim Pastor for First Lutheran Church of Harris, Minnesota. In August of 1994, Trinity Lutheran Church of Minnehaha Falls, in Minneapolis, extended a call to Olson, which he accepted.

Despite the Church's uncontroverted financial situation, Olson does not accept that his position was eliminated due to budgetary constraints and brought this lawsuit in Ramsey County District Court. He claimed breach of contract against both the Synod and the Church. He also asserted claims against the Church for wrongful discharge, promissory estoppel, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, violation of the Minnesota "Whistleblower" statute and negligent hiring and retention.

Although Olson lists claims other than his breach of contract claim in his petition for writ of certiorari, he does not

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[2] This vote taken was to eliminate the position rather than fire the person in that position.

discuss any claims other than breach of contract. For that reason, the Church will only respond to the breach of contract discussion presented. Nevertheless, the Church asserts that the state court was correct in its entire decision on all of the issues raised below.

REASONS TO DENY THE PETITION FOR WRIT

The state decision below in Olson is based upon well-established precedent from this Court regarding the interplay between the Establishment Clause and civil jurisdiction. Those cases expressly state that civil courts may not inquire into or review the relationship between a hierarchical church and its minister where such review would require an in-depth investigation into the church's internal governance and polity. Any violations of public policy or other improperly raised constitutional argument by Petitioners necessarily must yield to the overarching and fundamental doctrine of separation of church and state.

I. THE ESTABLISHMENT CLAUSE BARS CIVIL REVIEW OF A HIERARCHICAL CHURCH'S RELATIONSHIP WITH ITS MINISTER WHICH REQUIRES INTERPRETATION OF INTERNAL DOCUMENTS GOVERNING CHURCH POLITY

Based upon well-founded precedent from this Court, the state court below held that the Establishment Clause of the First Amendment bars civil review of Olson's claims because such a review would necessarily excessively entangle the state into internal Church governance and polity. The great weight of precedent and corresponding constitutional analysis show that the lower court's decision was proper. The First Amendment and the Minnesota Constitution bar civil review

of Olson's claims.[3] As a result, this Court should not exercise its discretionary review over this case.

The First Amendment necessarily limits civil review of religious disputes in order to maintain a "wholesome `neutrality'" between church and state. School District of Abington Township v. Schepp, 374 U.S. 203, 222 (1963). In Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), the Supreme Court outlined a three-part test to determine whether governmental action by the state violates the Establishment Clause of the First Amendment[4]. A governmental action must have a secular purpose and it cannot advance religion, inhibit religion, or foster "excessive government entanglement" with religion in order to be constitutionally valid. Id. at 612-13.

This case presents the question of civil review of the Church's determination of who will preach from its pulpit. The very nature of the issue presented demonstrates that any civil review of the Church's decision and process of eliminating the position of Assistant Pastor would cause precisely the excessive state entanglement into church governance which prohibited by the First Amendment. Questions revolving around the employment of a minister by a church are especially protected, because the decision of who will occupy the minister's position is "of prime ecclesiastical concern" and civil review "could only produce by its coercive effect the very

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[3] The Minnesota Constitution provides for greater protection for religious liberties against governmental action than the Federal Constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In State by Cooper v. French, 460 N.W.2d 2, 8-9 (Minn. 1990), the court stated that the "Minnesota Constitution, unlike the United States Constitution, treats religious liberty as more important than the formation of government." This provision alone should bar review.

[4] The First Amendment is applicable to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

opposite of that separation of church and state contemplated by the First Amendment." McClure v. Salvation Army, 460 F.2d 553, 558-60 (5th Cir. 1972), cert. den., 409 U.S. 896 (1972).

Civil review of intra-church disputes is curtailed even further when a hierarchical church is involved. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-709 (1976). In Milivojevich, the Court held that the First and Fourteenth Amendments prevent civil courts from deciding breach of contract claims such as Olson's that would require "extensive inquiry into [the] religious law and polity" of a hierarchical Church. Id. at 709. Judicial review would require an impermissible intrusion into the procedures, canon law, ecclesiastical law, or substantive criteria by which the church decides its ecclesiastical concerns. Id. at 713. If civil courts attempted make those determinations, they would "deprive [churches] of the right of construing their own church laws." Id. at 714.

The Court's analysis and holding in Milivojevich have been followed throughout the country. For example, in Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994), the court held that civil "review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring and firing of clergy, are themselves an 'extensive inquiry' into religious law and practice, and, hence forbidden by the First Amendment." 21 F.3d at 187 (emphasis added). The court in Hafner v. Lutheran Church-Missouri Synod, 616 F.Supp. 735, 738-39 (N.D. Ind. 1985), also followed precedent when it dismissed the minister plaintiff's claims for breach under the Synod constitution and stated:

> If the plaintiffs are correct it will become the function of this court to interpret that provision of the church constitution. Such an inquiry is the kind of inquiry

> that was requested of and rejected by the Supreme Court in the Serbian Eastern Orthodox Diocese case . . . A superficial and cursory examination of the Constitution of the Lutheran Church-Missouri Synod demonstrates beyond question that it is basically and fundamentally a religious doctrine. Indeed, it is the organic document of the church.

616 F.Supp. at 737-39 (citations omitted).

Again, the holding of Milivojevich was also followed in the Eighth Circuit's decision in Drevlov v. Lutheran Church, Missouri Synod, 991 F.2d 468, 470-71 (8th Cir. 1993), where the Court held that it had no jurisdiction to review a Church's personnel decision "where review by civil courts would require the courts to interpret and apply religious doctrine or ecclesiastical law."

On our facts and by application of the definition found in Milivojevich, it is plain that Luther Memorial Church is a hierarchical church.[5] The state court properly applied Milivojevich and its progeny. Based on that analysis, the lower court held that the inquiry required by Olson's claims is precisely the type of intrusion which is prohibited by the First Amendment.

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[5] For additional discussion of hierarchical versus congregational churches, see Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994); Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America, 860 F.Supp. 1194, 1195-96 (W.D. Ky. 1994), aff'd, 64 F.3d 664 (6th Cir.); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 110 (1952); Watson v. Jones, 80 U.S. (13 Wall.) at 724-25; Burgess v. Rock Creek Baptist Church, 734 F.Supp. 30, 31 n. 2 (D.D.C. 1990); and First Baptist Church of Glen Este v. State of Ohio, 591 F.Supp. 676, 681-82 (S.D. Ohio 1983).

This Court should let the state decision stand. As in Milivojevich, civil review of the substance and merits of Olson's claims would impermissibly require excessive entanglements between the civil courts and internal Church matters of ecclesiastical concern. From the date he filed suit against the Church, Olson has maintained that he was "terminated" and that said termination did not comply with the termination procedures set allegedly forth in the Church and Synod Constitutions. However, Olson has never presented a single provision of any internal church document relating to the elimination of an Assistant Pastor position.

A court reviewing this case would first have to determine whether there is any internal church provision relating to the elimination of a position, compare it to the facts at hand determine even if it or the provisions allegedly violated by the Church apply. Again, this exhaustive review and excessive entanglement is exactly the type of intrusion that the First Amendment was drafted to avoid.

For these reasons, this Court should deny discretionary review and let the state court decision in Olson stand. Any other decision will force the Church to bow to a secular court's interpretation of religious documents and procedure. That result would encourage the erosion of Church authority in internal ecclesiastical matters including church polity, governance and administration. The resulting relationship between the state and Church leaves the Church less able to govern itself and practice its faith. See Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985), cert. den. 478 U.S. 1020 (1986).

Finally, and despite Olson's contentions, courts throughout this nation have followed Supreme Court precedent and held that they may not review hierarchical clergy-church employment disputes.[6] The fundamental policy

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[6] See e.g., Yaggie, 860 F.Supp. at 1195-1196; Crowder v. Southern Baptist Convention, 828 F.2d 718, 724-26 (11th Cir. 1987), cert. den.,

underlying those decisions is that the secular state must be kept out of intra-church religious matters.

II. LIMITED NEUTRAL PRINCIPLES EXCEPTION TO DETERMINE PROPERTY DISPUTES BETWEEN CHURCH FACTIONS IS NOT APPLICABLE TO DISPUTE BETWEEN HIERARCHICAL CHURCH AND ITS MINISTER

While Thomas Jefferson spoke of a "wall of separation"[7] between church and state provided by the First Amendment, limited state intervention into some church activities is occasionally permitted. For example, churches must comply with fire inspections and zoning regulations. Lemon, 403 U.S. at 614.

These rare exceptions are justified only if there are compelling governmental interests affecting public health, safety or the general welfare. Id. Even so, incursions are only cautiously permitted where they influence a religious community's internal beliefs and decisions. Thomas v. Collins, 323 U.S. 516, 530 (1945) ("only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."); Sherbert v. Verner, 374 U.S. 398, 406 (1963);

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484 U.S. 1066 (1988); Rayburn, 772 F.2d at 1167-68; Granfield v. Catholic Univ. of America, 530 F.2d 1035, 1047 (D.C. Cir. 1976), cert. den., 429 U.S. 821 (1976) (determination of priest salaries was an internal religious matter into which a civil court had no ability to inquire); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989); Kaufmann v. Sheehan, 707 F.2d 355, 358-59 (8th Cir. 1983); EEOC v. The Catholic Univ. Of Amer., 856 F.Supp. 1 (D.C.Cir. 1994); Knuth v. Lutheran Church, Missouri Synod, 643 F.Supp 444, 447-48 (D. Kan. 1986).

[7] Discussed in People of State of Illinois v. Board of Education, Etc., 333 U.S. 203, 244 n. 8 (1948).

Simpson v. Wells Lamont Corp., 494 F.2d 490, 492-93 (5th Cir. 1974); Yaggie, 860 F.Supp. at 1198.

The Supreme Court has determined that a court may use "neutral principles of law" to resolve church property disputes. Maryland and Virginia Eldership of the Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970); Presbyterian Church in the United States v. Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Jones v. Wolf, 443 U.S. 595, 602 (1979). However, unlike Petitioners' broad-brushed assertions, this "neutral principles" exception is narrowly applied only in fact situations very different that those before the Court. Indeed, the exception is most often applied to congregational schisms of non-hierarchical churches in claims involving property disputes. See e.g. Hutchinson v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) cert. den. 479 U.S. 885 (1986)("neutral principles" exception applies only to church property).

Olson's reliance on Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) for the authority that neutral principles of law allow civil courts to review his dispute with the Church is misplaced. As noted by the state court below, the facts in Minker differ from those in Olson in that the decision was made on a motion to dismiss rather than a motion for summary judgment, Minker at 1356, and even the court in Minker noted that it would be difficult for the plaintiff to avoid summary judgment. Id. at 1360.

Minnesota state courts have used the "neutral principles" doctrine to determine intra-church disputes where the issues presented are unrelated to church doctrine or church governance. However, Minnesota courts give substantial deference in ecclesiastical matters. Piletich v. Deretich, 328 N.W.2d 696, 699-700 (Minn. 1982); Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991), rev. den. (Minn. Aug. 29, 1991); Schoenhals v. Mains, 504 N.W.2d 233, 235 (Minn.

Ct. App. 1993). Of course, there is no greater ecclesiastical and more protected decision than who is the minister of a hierarchical church. Milivojevich, 426 U.S. at 713; Young, 21 F.3d at 187.

Despite Olson's argument, the case of Black v. Snyder does not support to Olson's argument that neutral principles of law may be applied to this situation. In fact, the court in Black specifically declares that civil review into church doctrine and governance is prohibited by conducting the analysis required by Milivojevich. 471 N.W.2d at 720. Olson's reliance on the decision in Blauert v. Schupmann, 241 Minn. 428, 63 N.W.2d at 578 (1954), is similarly misplaced. The Blauert decision was made before this Court determined in Milivojevich that the First Amendment barred a bishop's wrongful discharge claim. 426 U.S. at 721-3. The Blauert decision was also limited by the Minnesota Supreme Court's analysis in Piletich, 328 N.W.2d at 701, and was differentiated by the Olson court below.

Just one of the cases cited by Olson squarely demonstrates the reasons why the neutral principles doctrine may not be applied. In General Council on Fin. and Admin. of the United Methodist Church v. Superior Court, 439 U.S. 1355, 1356, 99 S.Ct. 35, 36 (1978), this Court was presented with an interlocutory petition for discretionary review from a California court. Some 1,950 past and present residents of hospitals and convalescent homes operated by an alleged alter-ego of the United Methodist Church brought claims for fraud, breach of contract, and violations of California securities laws against the United Methodist Church. Id.

The Church's unsuccessful argument on petition for writ of certiorari was that civil determination of the structure and operation of a hierarchical church for personal jurisdiction analysis violated the First and Fourteenth Amendments. Id. at 1370. In response, the Court, per Justice Rehnquist as Circuit Justice, denied the petition for writ, and stated:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating **intrachurch** disputes. See Serbian Eastern Orthodox Diocese v. Milivojevich. **But this Court has never suggested that those constraints similarly apply outside the context of such intraorganization disputes.** Thus Serbian Eastern Orthodox Diocese and the other cases cited by applicant are not on point.

Id. at 1372 (emphasis added).

In sharp contrast to the General Council situation, here there are no purely secular third-parties involved who have asserted fraud claims against the religious organization. Indeed, this case presents an intrachurch employment dispute between a church and its minister involving purely ecclesiastical issues based upon organic religious documents such as the Church constitution. Therefore, unlike Petitioners' assertions, this Court has not endorsed any other circumstances permitting State intrusion into intrachurch employment relationships between a Church and its minister based upon "neutral principles of law." That has not happened because in such a critical issue of church polity and governance, any inquiry would fail the Lemon test for excessive entanglements in a religious matter.

Moreover, none of the cases cited by Olson as conflicting with the state's decision in Olson are sufficiently similar on their facts to create controversy or demonstrate a clash of analysis with the decision below. For example, in Gilespie v. Elkins Southern Baptist Church, 350 S.E.2d 175, 718 (W.Va. 1986), Robinson v. Davis, 511 N.Y.S.2d 311 (1987), and Tibbs v. Kendrick, 637 N.E.2d 397 (Ohio Ct. App. 1994), the courts were faced with disputes between pastors and their

congregational churches. The crucial difference between the decision in Olson and these cases is the type of church organization involved.

Unlike the facts of Olson, the pastors in those cases had no intrachurch process or avenue in which to pursue their concerns. Indeed, the Gilespie court itself states "we would hesitate to find that the trial court had jurisdiction at the time the suit was filed if the Church were a part of a hierarchical church structure...." Gilespie, 350 S.E.2d at 718. In comparison, this case involves a hierarchical church where Olson simply chose to "opt out" the review processes and appeals available to him through the hierarchical arrangement of the Church and Synod.

Similarly, the facts of Bacher v. Metcalf, 611 So.2d 1030 (Ala. 1992) cited by Petitioners as support for the alleged split in state courts on this issue, are dramatically different than those in Olson. The facts of Bacher are quite similar to that of Piletich v. Deretich, 328 N.W.2d 696, 699-700 (Minn. 1982), where the church congregation divided into factions and could not determine for itself the proper course of action. Paralleling the facts in Piletich, the congregation in Bacher, split itself into factions, took different votes and as a result, came up with different outcomes eventually requiring an accounting of church funds. Bacher, at 1030-1031. The courts found they could review this matter.

Again, the facts of Olson are quite different from Bacher and Piletich. The congregation in Olson remained as a unit and did not "splinter" into factions. Furthermore, there is no mention of any hierarchical review process in either Piletich or Bacher, a process which was undisputedly available in Olson.

Finally, the holdings in Fellowship Tabernacle, Inc. v. Baker, 869 P.2d 578, 579-580 (Id. Ct. App. 1994), and Feldbin v. Temple Beth-El of Manhattan Beach, 620 N.Y.S.2d 113, 114 (1994) should not be considered contradictory to the state's decision in Olson. Simply put, there are insufficient

underlying facts in the decisions to make a comparison valuable. For example, neither courts make any determination as to the congregational or hierarchical structure of the organizations involved.

From the above, this Court should determine that the "neutral principles of law" arguments asserted by Olson in his petition for writ of certiorari do not rise to the level of issue this Court must address. As a result, Olson's petition should be denied.

III. THIS COURT MAY NOT CONSIDER OLSON'S DUE PROCESS AND EQUAL PROTECTION ARGUMENTS WHICH WERE NEITHER PRESENTED TO NOR PASSED UPON BY STATE COURTS

On petition for writ of certiorari, this Court has jurisdiction only over issues which were presented to, considered or decided to the state courts below. Wilson v. Cook, 327 U.S. 474, 483-484, 66 S.Ct. 663, 667-668 (1946); Exxon Corp. v. Eggerton, 462 U.S. 176, 103 S.Ct. 2296, 2300 n. 3 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 60 S.Ct. 670, 672 (1940); Clark v. Jeter, 486 U.S. 456, 458-461, 108 S.Ct. 1910, 1913 (1988). This jurisdictional rule was established very early in the history of the court. See Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162 (1969) (citing Crowell v. Randell, 10 Pet. (35 U.S.) 368, 9 L.Ed. 458 (1836)). The rule prohibits the Court from deciding federal constitutional issues not previously raised at the state level.

The provisions of the rule are codified in 28 U.S.C. § 1257(a), which provides that this Court may review final judgments or decrees rendered by the highest court of a State in which a decision could be had involving federal claims. Moreover, the jurisdictional nature of the rule and its effect is

also recognized and enforced by the Court in Supreme Court Rules 14.1(e) and 14.1(g), which require a party to state where the questions presented for review were raised, the method and manner in which they were raised and the way in which they were "passed upon" by the courts. By operation of Rule 15(4) of the Supreme Court Rules, the Church was unable to bring any motion or objection to jurisdiction other than through this brief.

After review of these policy concerns and the Court's often-repeated requirements and Rules, it is clear that the Petitioners' petition for writ of certiorari is deficient because it fails to detail the Court's jurisdictional requirements by omitting that its Due Process and Equal Protection arguments were never raised in state court proceedings.

Despite the jurisdictional effect of the rule as stated above, it should be noted that later cases from this Court have demonstrated that the jurisdictional effect of the "not pressed or passed upon below" rule is in a state of flux. The court recently described this rule as "prudential" rather than jurisdictional in nature. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983); Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 80, 78-799, 108 S.Ct. 1645, 1650-1651 (1988).

There are powerful policy considerations underlying this jurisdictional rule which is described as the "pressed or passed upon below" rule. See Webb v. Webb, 451 U.S. 496, 498-499, 101 S.Ct. 1889, 1893 (1981). Those considerations range in weight, but in the whole, they demand that this court review only those issues which have been raised at lower courts. First, the principle of comity requires that this Court give proper respect for state functions in the federal system. Webb, 451 U.S. at 498-99. That principle requires that the state courts be allowed to perform their duties before federal courts address those issues even if the litigation centers upon federal issues. Id. It is "similar to the principle that stands behind the exhaustion-of-state-remedies doctrine" which is

applied in federal habeas corpus cases of state prisoners. Id. (citing Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971)).

Practicality considerations make up the second reason behind the requirement that state courts review claims before this Court. Webb 451 U.S. at 500, 1894 S.Ct. at 1894. Earlier review by lower courts allows the parties to develop the record necessary to adjudicate the issue at the appellate level. It allows the states to construe state statutes to avoid or obviate the need to invoke federal constitutional concerns and ensures that if there are "independent and adequate state grounds" that would determine an issue, those grounds would be used to support a decision rather than federal constitutional theory. Id. Finally, it gives state courts the ability to adjudicate federal claims to dispose of the case, which in turn, reduces the workload of this Court. Id. 451 U.S. at 501.

The facts underlying the discussion found in Illinois v. Gates, 462 U.S. at 216-224, are particularly helpful in demonstrating this point. In Illinois v. Gates, the Court was presented with a search and seizure argument and asked the parties to brief a constitutional theory not argued before it. Id. at 217. The Court decided "with apologies to all" that the issue upon which it requested briefing was not properly before it and therefore did not address that theory in its decision. Id. Here, the parties should be able to avoid the additional and eventually unnecessary briefings on Due Process and Equal Protection issues which were never raised in the state courts.[8]

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[8] It should be noted that the general practice of Minnesota courts is to not consider issues raised for the first time on appeal. Matter of Welfare of K.T., 327 N.W.2d 13, 16 (Minn. 1982); Krueger v. State Farm Fire & Cas. Co., 510 N.W.2d 204, 209 (Minn. Ct. App. 1993) (scope of appellate review limited to issues decided by trial court); accord, McIntire v. State, 458 N.W.2d 714, 717 n.2, (Minn. Ct. App. 1990), cert. den., 498 U.S. 1090 (1991), reh. den., 499 U.S. 970 (1991).

Because review of the Due Process and Equal Protection issues presented for the first time would violate the principle of comity and presents practical barriers such as lack of record or of a potentially independent and adequate state grounds for decision, this Court should simply decline to consider the Due Process and Equal Protection arguments asserted in the Petition. Additional support for this request is supplied by Brockett v. Spokane Arcades, 472 U.S. 491, 105 S.Ct. 2794 (1985)(Supreme Court must never anticipate a question of constitutional law and never formulate rule of law broader than required by the precise facts before it).

IV. THE DUE PROCESS AND EQUAL PROTECTION CLAIMS RAISED SHOULD BE SUMMARILY DISMISSED ON THE STRENGTH OF FIRST AMENDMENT PROTECTION AGAINST CIVIL INTRUSION INTO CHURCH GOVERNANCE

Should this Court review the Due Process and Equal Protection arguments that not been considered by the lower court, the decisions in Milivojevich, Knuth v. Lutheran Church, Missouri Synod, 643 F.Supp 444, 447-48 (D. Kan. 1986), and Nunn v. Black, 506 F.Supp. 444, (W.D.Va. 1981), aff'd, 661 F.2d 925 (4th Cir. 1981), cert. den. 454 U.S. 1146 (1982) should be dispositive.

In Knuth, the plaintiff was removed from the Missouri Synod's clergy roster and was unsuccessful in his attempts to regain that status. 643 F.Supp. at 445-446. He brought suit and alleged that the Synod had breached certain contractual obligations, among other theories. His claims were based on rights allegedly found within the Synod Constitution, its articles of incorporation, bylaws, official publications, handbooks and rules of procedure. Id. at 447.

The court dismissed the lawsuit and held there was no subject matter jurisdiction to review the church's decision

because that review required impermissible involvement into the church canon and ecclesiastical law. The Knuth court held:

> In construing these religious documents and doctrines, the court would usurp the rights of the highest religious bodies to construe their own church laws. . . . **'Due process' and 'fundamental fairness' are constitutional and secular concepts that are not relevant to ecclesiastical decisions** which by their religious nature are reached and accepted as matters of faith. . . . Plaintiff's claims relate to his rights as a minister and former minister which go to the heart of eternal church discipline, faith, and church organization, all involved with ecclesiastical rule, custom and law.

Id. at 448 (citations and internal quotes omitted).

Similarly, the decision in Nunn v. Black demonstrates that these claims should be dismissed. In Nunn, the court was presented with issues surrounding congregation members expulsions from a church. 506 F.Supp. at 448. In its review of the case, the Nunn court noted there was no state action to prompt a due process analysis. Id. at 448-449. The court followed the decision in Milivojevich by holding that constitutional concepts such as due process "involving secular notions of `fundamental fairness'...are...hardly relevant to such matters of ecclesiastical cognizance." Id. at 448; see Milivojevich, 426 U.S. at 715.

Here, as in the cases cited above, there is absolutely no state action to trigger analysis under Due Process or Equal

Protection. The cases cited by Olson are distinct both factually and procedurally from the matter before this Court.[9]

Based upon the reasoning and rationale of Milivojevich, Knuth and Nunn, the Due Process and Equal Protection issues raised by Olson must yield to the necessarily fierce protections and limitations of the First Amendment.

CONCLUSION

For the foregoing reasons, Respondent Luther Memorial Church asks this Court to deny the petition for writ of certiorari from the well-reasoned state decision below.

DATED: August 30, 1996

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[9] For example, Olson cites Logan v. Zimmerman, 455 U.S. 422 (1982), for the proposition that he has a property interest triggering Due Process analysis. In Logan, the access to the court system was created by the Illinois Fair Employment Practices Act. Id. at 422-23. Here, there is no such "property interest" to court access. Further, the Equal Protection scrutiny in Broddie v. Connecticut, 401 U.S. 371 (1971), was partly due to the state's monopolization of the means of resolving the issues addressed regarding divorce and marriage. 401 U.S. at 376-377. Here, Olson refused other means available for resolution.